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{SHOW } PROCEEDINGS AND ORDERS DATE: 01298

CASE NBR 84-1-00385 CSX
SHORT TITLE Honda Motor Co. DOCKETED: Sep 11 1984
VERSUS Coons, Walter P.

Date	Proceedings and Orders
Sep 11 1984	Petition for writ of certiorari filed.
Sep 11 1984	Appendix of petitioner Honda Motor Co., Ltd. filed.
Jul 30 1984	Application for stay filed, and order denying same by White, J., on 7/31/84.
Oct 1 1984	Order extending time to file response to petition until November 13, 1984.
Oct 11 1984	Order extending time to file response to petition until October 31, 1984.
Oct 11 1984	This extension of time applies to New Jersey.
Oct 24 1984	Brief of respondent Atty. Gen. of NJ in opposition filed.
Nov 13 1984	Brief of respondent Walter P. Coons in opposition filed.
Nov 14 1984	DISTRIBUTED. November 30, 1984
Nov 14 1984	REDISTRIBUTED. November 30, 1984
Nov 20 1984	Reply brief of petitioner Honda Motor Co., Ltd. filed.
Dec 3 1984	REDISTRIBUTED. December 7, 1984

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 01298

CASE NBR 84-1-00385 CSX
SHORT TITLE Honda Motor Co. DOCKETED: Sep 11 1984
VERSUS Coons, Walter P.

Date	Proceedings and Orders
Dec 3 1984	REDISTRIBUTED. December 7, 1984
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Dec 17 1984	Supplemental brief of petitioner Honda Motor Co., Ltd. filed.
Jan 7 1985	Petition DENIED. Dissenting opinion by Justice Rehnquist. (Detached opinion.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

Following remand of this case by this Court two years ago "for further consideration in light of *G.D. Searle & Co.* v. *Cohn* [455 U.S. 404 (1982)]," the New Jersey Supreme Court ruled in *Coons I* that the New Jersey statute which tolls state statutes of limitation against non-New Jersey corporations (N.J. Stat. Ann. § 2A:14-22 (West 1952)) violates the Commerce Clause of the United States Constitution, and that its decision would be retroactive. On rehearing, however, the New Jersey Supreme Court in *Coons II* reversed itself and chose to apply New Jersey retroactivity law to make its decision in *Coons I* wholly prospective. The Court's decision bars petitioner Honda Motor Co., Ltd. and other non-New Jersey corporations from raising a statute of limitations defense *in any action currently pending in New Jersey, in any action for personal injury filed in New Jersey prior to August 3, 1985*, and *in any action for property damage or breach of contract filed in the state prior to August 3, 1989*. New Jersey corporations, on the other hand, are and will be able to raise a limitations defense in any pending or future action, regardless of when the action was filed. The questions presented are as follows:

(1) Whether a state supreme court, in conflict with numerous precedents of this Court and of other state courts of last resort, may apply state law to determine whether its decision holding a state statute invalid on federal constitutional grounds should be retroactively applied.

(2) Whether the New Jersey Supreme Court, by its decision in *Coons II* to make *Coons I* wholly prospective, has created a new and independent violation of the Commerce Clause of the United States Constitution.

(3) Whether a state supreme court may apply prospectively a decision holding a state statute invalid on federal

constitutional grounds when the state court admits that the decision did not constitute a "clear break" with past law, when there could be neither justifiable nor actual reliance on the state statute in question, when prospectivity severely undermines the constitutional interests at stake, and when the equities favor retroactivity.

(4) Whether a state supreme court may refuse to apply a decision holding a state statute invalid on federal constitutional grounds to the defendant and *amici* who litigated the constitutionality of the statute for several years, because the defendant and *amici* are "institutional litigants."

PARTIES BELOW

Parties to this case in the court below are those listed in the caption of this petition, and the Attorney General of New Jersey, who was granted leave to intervene by the Appellate Division of the New Jersey Superior Court on August 3, 1982. Honda Motor Co., Ltd., and American Honda Motor Co., Inc. are together the sole owners of Honda of America Manufacturing, Inc. Honda Motor Co., Ltd. has no parent companies, affiliates or other subsidiaries (except wholly owned subsidiaries).

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IN THE

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OCTOBER TERM, 1984

No.

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner Honda Motor Co., Ltd. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey in this case.[1]

---

[1] Honda gratefully acknowledges the aid of attorneys for Brinco Mining Limited—through its national counsel, Shea & Gardner, of Washington, D.C.—in the preparation of this petition. Brinco, a Canadian asbestos mining company, has had a longstanding interest in the issues raised here due to the potential effect on hundreds of cases currently pending against Brinco in New Jersey and in other states with similar tolling statutes. Brinco submitted an *amicus* brief to this Court in the related case of *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), and submitted *amicus* briefs and participated in oral argument on the merits in both *Coons I* and *Coons II*.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court on the retroactivity issue (*Coons II*) (App. 1a-27a) is reported at 96 N.J. 419, 476 A.2d 763 (1984).[2] The prior opinion of the New Jersey Supreme Court declaring the New Jersey tolling statute unconstitutional on Commerce Clause grounds (*Coons I*) (App. 28a-54a) is reported at 94 N.J. 307, 463 A.2d 921 (1983). One decision of the Appellate Division of the New Jersey Superior Court (App. 55a-64a) is reported at 176 N.J. Super. 575, 424 A.2d 446 (1980), and another decision of the Appellate Division (App. 65a-68a) is not reported. The two opinions of the trial court (App. 69a-72a) are not reported.

JURISDICTION

The judgment of the New Jersey Supreme Court in *Coons II* (App. 1a-27a) was rendered on June 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).[3]

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[2] Citations to "App." refer to the separate appendix that accompanies this certiorari petition pursuant to Rule 21(k) of this Court.

[3] The federal questions presented here—whether federal law should have controlled the retroactivity of *Coons I* and whether *Coons II* reached the correct result under federal law—were first raised in the briefs and oral argument preceding *Coons II*, after the New Jersey Supreme Court had decided to reconsider its earlier retroactivity ruling in *Coons I*. The New Jersey Supreme Court explicitly rejected the claim that federal law should govern the retroactivity of *Coons I*, ruling in *Coons II* that *Coons I* would be prospective "as a matter of state law." (App. 4a.)

The federal constitutional issue presented here—whether the decision in *Coons II* to make *Coons I* prospective is an independent violation of the Commerce Clause—was also first raised in the briefs and oral argument preceding *Coons II*. By its decision in *Coons II* that *Coons I* should be prospective, the New Jersey Supreme Court necessarily rejected the claim that making *Coons I* prospective would be an independent violation of the Commerce Clause.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution art. I, § 8, cl. 3:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, ..."

New Jersey Statutes Annotated, § 2A:14-22 (West 1952):

> "If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation."

STATEMENT OF THE CASE

A. *Introduction.* This case, which involves the constitutionality of N.J. Stat. Ann. § 2A:14-22 (West 1952) (the New Jersey "tolling" statute), is before this Court

for the second time. Over two years ago, while an appeal in this case was pending, this Court decided *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), which also involved a constitutional challenge to the New Jersey tolling statute. The tolling statute suspends certain New Jersey statutes of limitation against corporations neither incorporated nor registered to do business in New Jersey. In *Searle*, this Court ruled that the tolling statute did not violate the Equal Protection Clause, but that a remand was necessary for consideration by the lower court of the tolling statute's validity under the Commerce Clause. *Id.* at 408-14. Following the remand in *Searle*, this Court vacated the judgment in this case, and remanded it "for further consideration in light of *G.D. Searle & Co.* v. *Cohn* . . . ." 455 U.S. 996 (1982). The decision challenged here is a direct result of that remand, and, as explained at pp. 6-7 & n.5, *infra*, this case has become, in effect, the vehicle for litigating the issues left open by this Court in its remand of *Searle* itself.

The New Jersey Supreme Court subsequently ruled that the New Jersey tolling statute violates the Commerce Clause and provided for a wholly retrospective application of its decision (*Coons I*). (App. 28a-54a.) On rehearing, however, the New Jersey Supreme Court, applying state law, reversed itself and made its invalidation of the tolling statute wholly prospective (*Coons II*). (App. 1a-27a.) The effect of the "prospectivity" ordered by the New Jersey Supreme Court in *Coons II* is that the defendant in this case, Honda Motor Co., Ltd., and other non-New Jersey corporations, engaged solely in interstate commerce in New Jersey and amenable to suit there, are not able to raise a statute of limitations defense in any action currently pending in New Jersey. Moreover, such corporations will not be able to raise a limitations defense in any personal injury action filed in New Jersey prior to August 3, 1985, or in any contract or property damage action filed in the state prior to August 3, 1989.

New Jersey corporations, on the other hand, are and will be able to raise a limitations defense in any pending or future action, regardless of when the action was filed. The record before the New Jersey Supreme Court in *Coons II* indicated that the prospective application of *Coons I* ordered in *Coons II* would mean that hundreds of now pending or yet to be filed New Jersey cases—which would otherwise be barred on statute of limitations grounds—would be allowed to proceed solely against non-New Jersey corporations.[4] It is this "prospectivity" ruling which is challenged here.

B. *Background.* Respondent Coons commenced this suit in 1978 for personal injuries and other losses resulting from a motorcycle accident in 1974. (App. 4a.) Named as defendants in the suit were two corporations—American Honda Motor Co., Inc. ("American Honda"), a California corporation which sells motorcycles in the United States and which is registered to do business in New Jersey, and Honda Motor Co., Ltd. ("Honda"), a Japanese corporation which manufactures motorcycles in Japan and which is not registered to do business in New Jersey. (App. 4a.) American Honda was granted summary judgment on statute of limitations grounds following the trial court's determination that respondent Coons' claim had accrued more than two years before he filed suit

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[4] The importance of *Coons I* and *Coons II* to pending and future cases filed in New Jersey is illustrated both by the fact that the New Jersey Supreme Court certified *Coons I* on its own motion after the remand by this Court (App. 73a), and by the high participation by nonparties in both *Coons I* and *Coons II*. The Attorney General of New Jersey intervened in *Coons I* to defend the constitutionality of the statute, and filed briefs and participated in oral argument on the merits in both *Coons I* and *Coons II*. Four different *amici* submitted briefs in *Coons I* and seven *amici* submitted briefs in *Coons II*. One *amicus* participated in oral argument on the merits in *Coons I* and three *amici* participated in the argument in *Coons II*.

(App. 67a); this dismissal of American Honda was affirmed by the Appellate Division of the New Jersey Superior Court. (App. 65a-68a.) Honda, however, was not similarly granted summary judgment for the reason that, under the tolling statute, Honda was precluded from raising a statute of limitations defense to Coons' claim because it was not "represented" in New Jersey within the limitations period. (App. 5a.) The Appellate Division sustained this denial of summary judgment to Honda, ruling that the tolling statute applied to Honda and was constitutional (App. 55a-64a), and the New Jersey Supreme Court refused to hear a further appeal. (App. 31a.) Honda then filed an appeal to this Court.

While Honda's appeal was pending, this Court decided *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), holding, over the dissent of Justice Stevens, that New Jersey's tolling statute did not violate the Equal Protection Clause. *Id.* at 408-12. This Court also ruled, however, that *Searle* should be remanded to the lower court for consideration of the tolling statute's precise meaning under New Jersey law and its constitutionality under the Commerce Clause. *Id.* at 412-14.

Justice Powell, joined by Chief Justice Burger, dissented to the remand on the grounds that the Commerce Clause issue was properly before this Court and that there was no ambiguity in the tolling statute. 455 U.S. at 414-19. Justice Powell also noted that the argument that the tolling statute was unconstitutional under the Commerce Clause had "considerable force," 455 U.S. at 419-20, citing *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974).

Following the decision in *Searle*, this case was similarly remanded for resolution of the Commerce Clause issue, 455 U.S. 996 (1982), and since has become the vehicle for litigating the issues left open by this Court in its

remand in *Searle*.[5] Indeed, the importance of *Coons* to *Searle* is shown by the fact that the parties in *Searle* briefed and, in one instance, participated in oral argument, as *amici* in *Coons I* and *Coons II*.

C. *Coons I*. Soon after this case returned to the Appellate Division, the New Jersey Supreme Court certified the case on its own motion. (App. 73a.) On August 3, 1983, the New Jersey Supreme Court, by a 4-3 vote, struck down the New Jersey tolling statute on Commerce Clause grounds. The court ruled first that the tolling statute requires that corporations not incorporated in New Jersey register to do business in the state in order to gain the benefit of the state statutes of limitation. (App. 29a-30a.) The New Jersey Supreme Court went on to hold that, under a long line of decisions of this Court, this "forced-licensure" provision violates the Commerce Clause. (App. 38a-40a.) The New Jersey court also ruled that its decision that the tolling statute was unconstitutional would be retroactive; thus, the decision "[would] apply to all matters that have not reached final judgment." (App. 40a.)

D. *Coons II*. Last January, however, the New Jersey Supreme Court granted rehearing of *Coons I*, limited to the retroactivity question. (App. 4a.) On June 13, 1984, the New Jersey Supreme Court, by a 4-3 vote, reversed its earlier retroactivity decision and held, "as a matter of state law," that "*Coons I* is to be made effective as of

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[5] *Searle* and its companion case, *Kelsey-Hayes, Inc.* v. *Hopkins*, 455 U.S. 985 (1982), were remanded to the United States Court of Appeals for the Third Circuit, which in turn sent the cases back to the federal district court. 677 F.2d 301, 302 (3d Cir. 1982). Following that remand, both *Searle* and *Kelsey-Hayes* were stayed by the federal district court pending decision by the New Jersey Supreme Court in *Coons*. On June 21, 1984, Judge Brotman, in a two page opinion, applied *Coons II* in the *Kelsey-Hayes* case, ruling that the defendant there could not raise the statute of limitations. *Hopkins* v. *Kelsey-Hayes, Inc.*, No. 78-1646 (D.N.J., filed June 21, 1984). Another case remanded by this Court following its decision in *Coons, Maren Engineering Corp.* v. *Velmohos*, 455 U.S. 985 (1982), was settled by the parties shortly after the remand.

August 3, 1983—that is, the statute of limitations as to foreign, unrepresented corporations commences to run as of that date." (App. 4a, 19a.)[6] The New Jersey court also determined that its prospectivity ruling in *Coons II* would be applied "across the board," that is, that the benefits of the decision in *Coons I* would be denied to everyone, including Honda and various *amici* who participated in *Coons I*. There was "no injustice" in this result, according to the New Jersey majority, since Honda and the *amici* are "institutional litigants," *i.e.*, "of a class that will in the future frequently have resort to the statute of limitations, unimpeded by so much of [the tolling statute] as deprived them of that benefit." (App. 18a.)

Coons II thus effectively denies Honda and supporting *amici* the fruits of their labors. As noted above, *Coons II* allows suits to proceed against Honda and other non-New Jersey corporations for years in the future, solely on the basis of a statute which has been conclusively deemed a violation of the Commerce Clause.

In her dissent, Justice Garibaldi stated first that, regardless of the court's conclusion on retroactivity, the benefits of *Coons I* should be extended to Honda and the corporate *amici* as a matter of "fundamental fairness." "When a statute's unfair and discriminatory features render it offensive to the supreme law of our land, it is just to resolve the matter so that challenging litigants be spared further constitutional deprivation. Only in this fashion may the unconstitutional burden which has heretofore been placed upon them be eradicated." (App. 23a.)

---

[6] The statute of limitations period for personal injury actions in New Jersey is two years, N.J. Stat. Ann. § 2A:14-2 (West 1952); for contract and property damage actions, the limitations period is six years. N.J. Stat. Ann. § 2A:14-1 (West Supp. 1984). While the New Jersey Supreme Court did not spell out the ramifications of *Coons II*, the quoted language appears to mean that non-New Jersey corporations will not have a statute of limitations defense in personal injury actions filed prior to August 3, 1985, or in property damage or contract actions filed prior to August 3, 1989.

Instead, the result of the majority's ruling is that until August 3, 1985—two years from *Coons I*—"plaintiffs who have sat on their rights will be able to institute actions against these parties and impose additional unconstitutional burdens upon them." (App. 23a.) Justice Garibaldi found the majority's observation that Honda and the *amici* were "institutional litigants" "insufficient to carry the day." "All litigants should be treated equally before the courts." (App. 23a.) Moreover, denying Honda and the corporate *amici* the benefits of the ruling in *Coons I* they secured destroys incentives for litigants to challenge unconstitutional statutes: "We need private attorneys to push forward the frontiers of the law, but we will not have them if they stand to gain nothing through their efforts." (App. 20a.) On this point—that *Coons I* should be applied to Honda and the corporate *amici*—Justice Garibaldi was joined in dissent by Justices Schreiber and Pollock. (App. 27a.)

Justice Garibaldi went on to argue that *Coons I* should be given "complete retroactive effect." (App. 23a.) Prospectivity, she reasoned, "frustrates" the purpose of the decision, since it "countenances the very unconstitutionality that we sought to abrogate in *Coons I*." (App. 25a.) When a law is held unconstitutional, "only extraordinarily strong policy reasons"—not present in this case—can justify prospectivity. (App. 25a.) Moreover, the record in the case shows that Mr. Coons and various *amici* supporting his position "did not place any reliance whatsoever upon the tolling statute;" in past decisions, some "actual reliance" has been needed to justify prospectivity. (App. 25a-26a.) To apply *Coons I* prospectively, Justice Garibaldi observed, "does nothing to advance the equities of this case since . . . the parties did not rely on the old rule," but "does delay the effect of the new rule, and thereby retards its purpose." (App. 26a.) She concluded with this assessment of the majority's motivation: "New Jersey cannot afford to create inconsistent decisions based on this Court's desire to give a certain

class of plaintiffs a remedy to which they are not entitled." (App. 26a-27a.)

REASONS FOR GRANTING THE WRIT

I. The New Jersey Supreme Court's Reliance on State Law To Decide the Retroactivity of *Coons I* Conflicts with Numerous Precedents of This Court and of Other State Courts of Last Resort, and, If Left Uncorrected, Would Provide a Means for State Courts To Circumvent Totally Enforcement of Federal Constitutional Rights.

In *Coons II*, the New Jersey Supreme Court chose to make *Coons I* prospective "as a matter of state law." (App. 4a.) This holding conflicts with numerous precedents of this Court and of other state courts of last resort and, if allowed to stand, it would provide a means for state courts, through application of state retroactivity law, to undermine entirely enforcement of federal constitutional rights. Indeed, as shown below (pp. 12-18), the application of state retroactivity law in *Coons II* has had just this result, since through its prospectivity ruling in *Coons II*, the New Jersey Supreme Court has created a new and independent violation of the Commerce Clause.

The precedents of this Court dictate that federal law must govern the application and enforcement by states of federal constitutional rights. *E.g.*, *Chapman* v. *California*, 386 U.S. 18, 21 (1967) (determination of whether violation of a criminal defendant's federal constitutional rights in state court was harmless error must be governed by a federal—rather than a state—harmless error standard). In the retroactivity area, this Court has frequently reviewed state court decisions on the retroactivity of new federal constitutional protections for criminal defendants, thus implicitly holding that federal law must control. *E.g.*, *Brown* v. *Louisiana*, 447 U.S. 323, 326-27 (1980) (reversing decision of Louisiana Supreme Court that decision holding nonunanimous juries for nonpetty

offenses unconstitutional should be applied only to juries empaneled after the date of the decision); *Michigan* v. *Payne*, 412 U.S. 47, 57 (1973) (reversing decision of Michigan Supreme Court applying *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), retroactively).[7]

So too, state courts have repeatedly acknowledged that federal precedents control the retroactivity of federal constitutional decisions. *E.g.*, *People* v. *Burnick*, 14 Cal.3d 306, 535 P.2d 352, 369 (1975) (under U.S. Supreme Court retroactivity principles, decision that Fourteenth Amendment requires proof beyond reasonable doubt in mentally disordered sex offender proceedings must be retroactively applied); *State* v. *Bernard*, 391 So.2d 1180, 1181 (La. 1980) (in *Brown* v. *Louisiana*, *supra*, U.S. Supreme Court ordered retroactive application of decision in *Burch* v. *Louisiana*, 441 U.S. 130 (1979), prohibiting nonunanimous six-member jury verdicts; hence 5-1 verdict returned against defendant in a pre-*Burch* trial must be reversed); *Commonwealth* v. *Stokes*, 374 Mass. 583, 374 N.E.2d 87, 91-92 (1978) (decision in *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), making retroactive decision concerning constitutional requirements for jury charge on self-defense in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), requires reversal of defendant's pre-*Mullaney* conviction); *People* v. *Patterson*, 39 N.Y.2d 288, 347 N.E.2d 898, 903 (1976), *aff'd*, 432 U.S. 197 (1977) (U.S. Supreme Court retroactivity precedents mandate retroactive application of federal constitutional rule set forth in *Mullaney* v. *Wilbur*, *supra*); *Commonwealth* v. *Hilbert*, 476 Pa. 288, 382 A.2d 724, 727-28 (1978) (U.S. Supreme Court's decision in *Hankerson* v. *North Carolina*, *supra*, which mandates retroactive application of *Mullaney* v. *Wilbur*, *supra*, requires reversal of defendant's pre-*Mullaney* conviction).

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[7] Other cases where this Court has reviewed state court decisions on the retroactivity of federal constitutional protections include *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977); *Ivan V.* v. *City of New York*, 407 U.S. 203 (1972); *Adams* v. *Illinois*, 405 U.S. 278 (1972).

Thus, if allowed to stand, the New Jersey Supreme Court's decision to rest its prospectivity holding in *Coons II* on state law conflicts both with numerous precedents of this Court and of other state courts of last resort. Moreover, as *Coons II* well illustrates, the New Jersey Supreme Court's holding on this point provides a method for state courts to circumvent totally enforcement of federal constitutional rights; it would allow a state court, in its own complete and unreviewable discretion, to make a decision of this Court concerning a federal constitutional right ineffective for years after the date of the decision "as a matter of state law," thus negating the federal constitutional right and insulating its decision from this Court's review. This is an unacceptable result in a system where the federal courts are meant to be the ultimate protectors of federal constitutional rights. This role of the federal courts is especially important where, as here, the Commerce Clause is concerned, since one of the main purposes of that clause is to protect against "state action which imposes special or distinct burdens on out-of-state interests unrepresented in the state's political process." L. Tribe, *American Constitutional Law* § 6-5, at 326 (1978).

II. By Its Prospectivity Holding in *Coons II*, the New Jersey Supreme Court Has Created a New and Independent Violation of the Commerce Clause, in Direct Conflict with a Long Line of Decisions by This Court Which the New Jersey Supreme Court Recognized as Controlling in *Coons I*.

Under the New Jersey Supreme Court's prospectivity holding in *Coons II*, petitioner Honda and other non-New Jersey corporations, engaged solely in interstate commerce in New Jersey, cannot assert a statute of limitations defense in any action currently pending in New Jersey, and will not be able to raise a limitations defense in future actions filed in New Jersey for some two to six years. New Jersey corporations, on the other hand, are

and will be able to assert a statute of limitations defense in any appropriate action, regardless of when that action was filed. As Justice Powell acknowledged in his dissent in *Searle*, 455 U.S. at 419-20, and as the New Jersey Supreme Court recognized in *Coons I* (App. 38a), under a long line of decisions of this Court, it is a *per se* violation of the Commerce Clause for a state to deny benefits of its judicial system (such as a statute of limitations defense) to a foreign corporation, engaged solely in interstate commerce in the state, simply on the ground that the foreign corporation has not obtained a license to do business there. *E.g.*, *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20, 33-34 (1974); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 291 (1921); *Sioux Remedy Co.* v. *Cope*, 235 U.S. 197, 204-05 (1914); *International Textbook Co.* v. *Pigg*, 217 U.S. 91, 111 (1910).[8] New Jersey's prospectivity decision in *Coons II* therefore creates a new and independent violation of the Commerce Clause.[9]

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[8] The cited cases involved state statutes held invalid because they improperly regulated interstate commerce, *i.e.*, "Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. To the extent New Jersey's tolling statute impacts on corporations such as Honda and *amicus* Brinco—whose products make their way to New Jersey from Japan and Canada respectively—the tolling statute may invoive regulation by New Jersey of foreign commerce, *i.e.*, "Commerce with foreign Nations." U.S. CONST. art. I, § 8, cl. 3. *Veazie* v. *Moor*, 55 U.S. 568, 573 (1852). Significantly, state regulation of foreign commerce is more stringently scrutinized than state regulation of interstate commerce: "If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce." L. Tribe, *American Constitutional Law* § 6-20, at 370 (1978).

[9] Thus, even if the New Jersey Supreme Court were correct that state law could govern the retroactivity of a federal constitutional decision (App. 4a), the application of state law retroactivity principles in this case has created an independent violation of the Commerce Clause—a separate federal question.

The fact that this Commerce Clause violation has been created by the New Jersey Supreme Court under the guise of holding "prospective" its decision that the tolling statute is unconstitutional does not eliminate the Commerce Clause violation. This Court has allowed decisions holding state laws unconstitutional to be applied prospectively only when prospectivity would not undermine the constitutional interests at stake. In *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*), for example, this Court affirmed a federal court order allowing limited reimbursement of religious schools for expenses incurred pursuant to a state statute struck down on First Amendment grounds only after concluding that the reimbursement "[would] not substantially undermine the constitutional interests at stake in *Lemon I*" and would present only a "remote possibility of constitutional harm." 411 U.S. at 201-03. In contrast, in *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977), this Court struck down on constitutional grounds an attempt by New York to reimburse religious schools for expenses incurred during the school year prior to a decision holding the statute authorizing the expense payments unconstitutional. *Id.* at 133. This Court recognized that, unlike *Lemon II*—where the constitutional harm had already occurred and where prospectivity would not cause new constitutional violations—to allow the reimbursement program in *Cathedral Academy* would mean that a constitutional violation would continue to occur each time a reimbursement payment to a religious school was made. *Id.* at 131-33. For this reason, even the limited reimbursement program attempted by New York "amount[ed] to a new and independently significant infringement of the First and Fourteenth Amendments," and was thus impermissible. *Id.* at 131-34.

Similarly, in *United States* v. *U.S. Coin & Currency*, 401 U.S. 715 (1971), this Court concluded that a decision that the Fifth Amendment precluded criminal conviction of gamblers who refused to file certain incrimina-

tory registration statements must be retroactively applied. This Court reasoned that "a rule of complete retroactivity" followed from the fact that the conduct in question "cannot constitutionally be punished in the first instance," 401 U.S. at 723-24; anything less than complete retroactivity would mean that constitutionally protected conduct could continue to be penalized, and would thus severely undermine the constitutional interests at stake. As Justice Brennan pointed out in his concurrence in *U.S. Coin*, prospectivity in the circumstances of that case would lead to the offensive result that "Virginia might keep in jail interracial married couples whose only offense was cohabitation within the State, so long as the cohabitation was prior to *Loving* v. *Virginia*, 388 U.S. 1 (1967); or that Arkansas could still discharge school teachers who taught evolution before we struck down the relevant statute in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968)." 401 U.S. at 728.[10]

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[10] *U.S. Coin* did not apply the balancing test often used by this Court in cases such as *Linkletter* v. *Walker*, 381 U.S. 618 (1965), to decide if new constitutional rules of criminal procedure should be retroactively applied. See also *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-09 (1971) (applying *Linkletter* balancing test to determine retroactivity of a federal statutory decision). *U.S. Coin* distinguished cases such as *Linkletter*—where the balancing test resulted in prospective application of the new rule—on the ground that such cases were "concerned [only] with the implementation of a procedural rule which does not undermine the basic accuracy of the fact-finding process at trial," and not, as in *U.S. Coin*, with "the kind of conduct that cannot constitutionally be punished in the first instance." 401 U.S. at 723. In other words, *U.S. Coin*'s rationale for distinguishing cases such as *Linkletter* was that, in those cases, prospectivity did not undermine constitutional interests or cause constitutionally protected conduct to be punished. See also *Michigan* v. *Payne*, 412 U.S. 47, 54 (1973) (*North Carolina* v. *Pearce*, 395 U.S. 711 (1969), should not be applied retroactively because decision only expanded "protective umbrella" for constitutional right; "foundational" right existed before decision and remains protected). *U.S. Coin* also pointed out that in any case where retroactive application of a new constitutional rule of criminal procedure

The New Jersey Supreme Court's prospectivity holding in *Coons II* thus conflicts with this Court's holdings in *Lemon II*, *Cathedral Academy*, and *U.S. Coin*. *Coons I* held that the Commerce Clause did not permit New Jersey to deny its state statute of limitations to foreign corporations engaged in interstate commerce in New Jersey, solely on the ground that these corporations were not registered to do business in New Jersey. *Coons I* held, in the terminology of *U.S. Coin*, that the failure of these foreign corporations to register to do business in New Jersey "cannot constitutionally be punished." Under *Coons II*, not only will this unconstitutional discrimination against and unconstitutional punishment of non-New Jersey corporations continue in the present suit, but the unconstitutional discrimination and punishment will continue in every suit now pending in New Jersey, and in future suits filed in the state for the next two to six years. Surely, allowing New Jersey to continue to punish and discriminate against non-New Jersey corporations on such a massive scale amounts to "a new and independently significant infringement" of the Commerce Clause.[11]

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would raise substantial doubts about the defendant's guilt, and thus about the state's right to punish him, *U.S. Coin*'s "rule of complete retroactivity" has applied. 401 U.S. at 723-24. *E.g.*, *Ivan V.* v. *City of New York*, *supra*, 407 U.S. at 204-05; *Hankerson* v. *North Carolina*, *supra*, 432 U.S. at 243-44.

[11] The conclusion that the prospectivity decision in *Coons II* amounts to a new violation of the Commerce Clause is not contradicted by the often-quoted statement from *Great Northern Ry. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932), that "the federal constitution has no voice upon the subject" of retroactivity. In *Sunburst*, this Court held that Montana could make a decision concerning state law prospective without violating the Due Process Clause. 287 U.S. at 363-66. *Sunburst* did not hold, however, that a court may make a constitutional decision prospective in any way it chooses without regard to constitutional concerns. This point was recognized by this Court in *Lemon II*, when it noted: "*Sunburst* does not, of course, suggest that we may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court." 411 U.S. at 200 n.2.

The continuing unconstitutional burdens on and punishment of non-New Jersey corporations created by *Coons II* are substantial. As noted above, not only in this case, but in hundreds of others, non-New Jersey corporations will be forced to defend suits that New Jersey corporations will not. For example, *amicus* Brinco alone indicated to the New Jersey Supreme Court that over six hundred suits are currently pending against it in New Jersey and that many more suits will probably be filed. A significant number of these suits would be barred under New Jersey's two year statute of limitations for personal injury actions.[12] Under the New Jersey Supreme Court's decision in *Coons II*, however, Brinco will be forced to defend these suits, while its co-defendant New Jersey corporations will be dismissed on statute of limitations grounds. Simply for exercising their constitutionally protected right not to register to do business in New Jersey, therefore, Honda, Brinco and other non-New Jersey corporations will be forced to defend and potentially pay judgments in suits in New Jersey for years. Given the hundreds of cases involved, this issue will undoubtedly come before this Court again.

Furthermore, the impact of *Coons I* and *Coons II* may not be limited to cases filed in New Jersey; several other states appear to have tolling statutes similar to New Jersey's, and courts in those states may look to *Coons I* and *Coons II* on both the Commerce Clause and prospectivity issues. *E.g.*, *Mead Corp.* v. *Allendale Mutual Insurance Co.*, 465 F. Supp. 355, 360-62 (N.D. Ohio 1979); *Vaughn* v. *Dietz*, 430 S.W.2d 487, 488-90 (Tex. 1968); *Macri* v. *Flaherty*, 115 F. Supp. 739, 743-44 (E.D.S.C. 1953). The obvious unconstitutionality and substantial burdens created by the New Jersey Supreme Court's prospectivity

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[12] Indeed, Brinco currently has pending motions for summary judgment on statute of limitations grounds in sixty of the approximately eighty claims pending against it in one group of federal court cases. These claims pending against Brinco in federal court are essentially identical to hundreds of the claims pending against it in New Jersey state courts.

decision in *Coons II* thus merit this Court's attention to the New Jersey tolling statute once again.

III. Even If This Court's Balancing Test Should Have Governed the Retroactivity of *Coons I*, the New Jersey Supreme Court Disregarded That Test's Threshold "Clear Break" Requirement and Otherwise Misapplied This Court's Balancing Test.

Even though the New Jersey Supreme Court improperly applied New Jersey retroactivity law in *Coons II*, it tried to reconcile New Jersey standards for civil retroactivity with the balancing standard set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). (App. 8a-9a.) We have shown above that because the prospectivity ordered in *Coons II* severely undermines the constitutional interests at stake and subjects constitutionally protected conduct to punishment, this Court's decisions in *Lemon II*, *Cathedral Academy*, and *U.S. Coin* mandate that "a rule of complete retroactivity"—rather than a balancing test of the sort set forth in *Chevron*—must control. (See pp. 12-18 & n.10, *supra*.) But even if the *Chevron* balancing standard did govern, correct application of *Chevron* would also lead to the conclusion that *Coons I* should be retroactive. Indeed, the result in *Coons II* is such a misapplication of *Chevron* that it is clear that the New Jersey Supreme Court did not in truth seek to apply *Chevron* in *Coons II*, but instead applied its own state retroactivity law to circumvent entirely the federal constitutional right it recognized in *Coons I*.

Chevron identified three considerations in making a decision prospective: (1) "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) a court must "weigh the merits and demerits in each case by looking to the prior history of the

rule in question, its purpose and effect and whether retrospective operation will further or retard its operation;" and (3) a court must "weigh[] the inequity imposed by retroactive application." 404 U.S. at 106-07, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965) and other cases. Three terms ago, in *United States* v. *Johnson*, 457 U.S. 537 (1982), a decision in which retroactivity principles were "rethought," *id.* at 548, this Court explained that the initial *Chevron* test sought to determine whether a decision was a "clear break" with past law, and that this "clear break" test was a "threshold" requirement for holding a civil decision prospective. 457 U.S. at 550 n.12. See also *id.* at 563 ("Finally, all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106-07. *See n. 12, supra.*") (Emphasis added.)[13] *Johnson* went on to explain that the "clear break" test this Court referred to in its discussion of *Chevron* is met only when a decision "[1] explicitly overrules a past precedent of [the court]; or [2] disapproves a practice [the court] arguably has sanctioned in prior cases; or [3] overturns a longstanding and widespread practice to which [the court] has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *United States* v. *Johnson*, *supra*, 457 U.S. at 551.

In *Coons II*, the New Jersey Supreme Court openly admitted that *Coons I* did not satisfy the *Chevron-Johnson* "clear break" threshold test for prospectivity; it conceded that "the law concerning the effect of the tolling statute on unlicensed foreign corporations was, at best, uncertain at the time plaintiff and the claimant-*amici* started suit," and that *Coons I* "did not literally alter precedent . . . ."

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[13] The reference to footnote 12 in this statement concerning *Chevron* is significant because it was in footnote 12 of *Johnson* (457 U.S. at 550 n.12) that this Court explained that the initial *Chevron* test embodied a "threshold" "clear break" requirement for holding a civil decision prospective.

(App. 15a-16a.) By the New Jersey Supreme Court's own admission, then, *Coons I* failed to meet the *Chevron-Johnson* "clear break" threshold requirement for prospectivity, and, for this reason alone, should have been held retroactive.[14]

Even assuming, however, that the first criterion of *Chevron* is just a factor to be considered and not a "threshold" test for prospectivity, or that the first criterion does not necessarily embody the "clear break" standard of *Johnson*, *Coons I* does not satisfy the first criterion of *Chevron*. As the New Jersey Supreme Court admitted, *Coons I* "did not literally alter precedent." (App. 16a.) *Coons I* also did not, in the words of *Chevron*, decide "an issue of first impression whose resolution was not clearly foreshadowed." The fundamental point is that the first *Chevron* criterion attempts to measure justifiable reliance, and there could have been no justifiable reliance by respondent Coons or by other New Jersey plaintiffs on the tolling statute. In fact, by the time re-

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[14] Last term, in *Solem* v. *Stumes*, 52 U.S.L.W. 4307 (U.S., February 29, 1984), a case involving the retroactivity of a new Fifth Amendment criminal law decision, this Court seemed to curtail severely the scope of *Johnson*, stating, without explanation, that *Johnson's* application of the "clear break" test did not control in *Stumes* because the retroactivity question in *Stumes* "is controlled by prior precedent, arises on collateral review, and does not involve the Fourth Amendment." 52 U.S.L.W. at 4308 n.3. This apparent curtailment of *Johnson* in *Stumes* was severely criticized by the three *Stumes* dissenters, 52 U.S.L.W. at 4315 (Stevens, J., joined by Brennan, J., and Marshall, J., dissenting), and was not the first time members of this Court have disagreed over the scope of *Johnson*. *E.g.*, *Mack* v. *Oklahoma*, 459 U.S. 900 (1982) (O'Connor, J., joined by Rehnquist, J., dissenting to decision to remand case to state court for reconsideration in light of *Johnson;* dissenters argue that *Johnson* is inapplicable because *Mack* involved Fifth, not Fourth, Amendment, and that a remand would only confuse lower courts). An additional reason for granting certiorari in this case is thus to clear up this evident disagreement over *Johnson*'s applicability to cases which do not involve the Fourth Amendment.

spondent Coons filed his suit against Honda, the New Jersey tolling statute had already been declared unconstitutional in *Cohn* v. *G. D. Searle & Co.*, 447 F. Supp. 903 (D.N.J. 1978). Moreover, until *Velmohos* v. *Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), *vacated and remanded*, 455 U.S. 985 (1982), there was a reasonable chance that New Jersey would interpret its tolling statute in line with the vast majority of states to suspend the limitations period only against foreign corporations not amenable to suit.[15] Thus, until *Velmohos*, a New Jersey plaintiff could not justifiably rely on the tolling statute to protect his claim against a foreign corporation amenable to personal jurisdiction in New Jersey. And, after *Velmohos*, it was foreshadowed that the tolling statute required registration, and that this registration requirement violated the Commerce Clause.[16] Thus, again, there could be no justifiable reliance on the tolling statute. For these reasons, then, *Coons I* fails to satisfy the first *Chevron* criterion for prospectivity—even without the restatement of this criterion in *Johnson*.

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[15] By 1978—the year respondent Coons filed suit—38 of the 42 states that had considered the issue had construed their tolling statutes not to suspend the limitations period against parties amenable to personal jurisdiction in the state. See *Cohn* v. *G. D. Searle & Co.*, 447 F. Supp. 903, 912 n.21 (D.N.J. 1978).

[16] As Justice Powell recognized in *Searle*, 455 U.S. at 416-19, New Jersey law provides no method short of registration for a foreign corporation to designate an agent. Moreover, the New Jersey Secretary of State, in a letter submitted to this Court in *Searle*, confirmed that a foreign corporation could only designate an agent through registration. *Id.* at 419. Indeed, the dissenters in *Coons I* acknowledged that the resolution of the statutory issue in *Coons I*, *i.e.*, that the tolling statute requires registration, was so definitely foreshadowed that it would be unfair to apply any other interpretation of the statute to the parties in *Coons I*. (App. 49a-50a.) The irony is that, given this position of the *Coons I* dissenters, Honda would have been better off had the dissenters prevailed in *Coons I*.

Furthermore, not only was there no "justifiable" reliance on the tolling statute by New Jersey plaintiffs, there was, as Justice Garibaldi observed (App. 25a), not even "actual" reliance on the statute in this case. Respondent Coons sued both American Honda and Honda at the same time—clear evidence that he did not postpone his suit against the unregistered corporation in reliance on the tolling statute. Indeed, Mr. Coons' counsel admitted at oral argument in *Coons II* that his client had filed suit just a few months after first realizing that he might have a claim and consulting with counsel, and that neither Mr. Coons nor his counsel postponed suit in reliance on the tolling statute.[17] Similarly, *amicus* Karl Asch, counsel for plaintiffs in many of the asbestos suits pending against *amicus* Brinco, admitted at oral argument that he filed suit for his clients as soon as he was contacted by them, and that he did not postpone filing in reliance on the tolling statute.[18] And, like respondent Coons, Mr. Asch's clients sued both New Jersey and non-New Jersey corporations at the same time, again evidencing a total lack of reliance on the tolling statute.

The New Jersey Supreme Court's only response to this clear evidence that there was neither justifiable nor actual reliance on the tolling statute by New Jersey plaintiffs was that a "presumption" of reliance was in

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[17] At the oral argument, respondent Coons' counsel, Mr. Jaffe, admitted that Mr. Coons first thought about filing a suit to recover from his motorcycle accident when he received a recall notice from American Honda in July 1978, and that Mr. Coons thereafter filed suit "as quickly as possible" on October 30, 1978. (App. 75a.) His claim was already barred by that time, however, because, under New Jersey's "discovery" rule, the two year limitations period on Mr. Coons' claim had commenced at the time of his accident in 1974. (App. 67a.)

[18] In response to a question from Chief Justice Wilentz, Mr. Asch stated: "We did in fact effect service [on the foreign corporations] once we were contacted in the case, your Honor." (App. 76a.)

order.[19] In the face of evidence that neither justifiable nor actual reliance had occurred, however, the New Jersey Supreme Court was obliged to do more than to "presume" reliance to satisfy the first criterion of *Chevron*. At issue here is whether an unconstitutional statute may continue in effect for some period to protect reliance interests. If not even actual—let alone justifiable—reliance occurred, there is absolutely no rationale for prospectivity. For a discussion of this point, see Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. Rev. 745, 773 (1983) (federal courts have treated evidence of actual reliance as "fundamental" to prospectivity).

The second factor highlighted in *Chevron*—the purpose and effect of the rule in question—again favors retroactivity. The purpose of *Coons I* was to end the discrimination against and burdens on non-New Jersey corporations created by the tolling statute. Under *Coons II*, this discrimination against and punishment of non-New Jersey corporations will continue in every suit now pending in New Jersey, and in future suits filed for the next two to six years, entirely thwarting the purpose of *Coons I*.[20]

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[19] The New Jersey Supreme Court stated that actual reliance would be "difficult" to measure, and that the failure of foreign corporations to register was some evidence "that participants in the events before us ordered their affairs in accordance with the tolling statute." (App. 17a.) If, however, foreign corporations had indeed "ordered their affairs in accordance with the tolling statute," the logical step would have been for them to register to do business in New Jersey and thus to secure the statute of limitations defense.

[20] The retroactivity opinions of this Court in the criminal procedure area, from which the principles of *Chevron* were derived, have stressed that the purpose to be served by the rule in question must be the "foremost" consideration in any retroactivity analysis, and that the other considerations should only control when the purpose of the rule "[does] not clearly favor retroactivity or prospectivity." *Desist* v. *United States*, 394 U.S. 244, 249, 251 (1969); *Brown* v. *Louisiana*, 447 U.S. 323, 328 (1980). But even without elevating

Turning to equitable considerations, prospectivity is again not justified. Making *Coons I* retroactive will bar some claims on statute of limitations grounds. But the New Jersey legislature has already determined that it is fair to have a statute of limitations; retroactive application of *Coons I* simply makes that statute of limitations equally available to both non-New Jersey and New Jersey corporations. If it were equitable for American Honda to be dismissed from this case on statute of limitations grounds, it is equally fair for Honda to be dismissed. This Court has acknowledged that statutes of limitation serve equitable interests.[21] Thus, the only "equitable" interest protected by *Coons II* is the interest of New Jersey plaintiffs in pursuing stale claims against non-New Jersey corporations after those plaintiffs' claims against New Jersey corporations have expired. It is the precise purpose of the Commerce Clause to protect against this sort of parochial advancement of in-state interests against out-of-staters. L. Tribe, *American Constitutional Law, supra*, § 6-5, at 326.

In sum, even correct application of the *Chevron* balancing factors should have led the New Jersey Supreme Court to the conclusion that *Coons I* should be retroactive. *Coons I* satisfies none of the *Chevron* criteria for prospectivity. *Coons I* did not constitute a "clear break" with past law, there could be neither actual nor justifiable reliance on the tolling statute, prospectivity severely undermines the constitutional interests at stake, and the equitable considerations favor retroactivity.

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the "purpose" consideration to this level, the prospectivity ordered in *Coons II* so undermines the purpose of *Coons I* that it cannot be sustained.

[21] *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.") (Citation omitted.)

IV. The New Jersey Supreme Court's Characterization of Honda and Its Supporting *Amici* as "Institutional Litigants" Is Insufficient Under Federal Law To Deny Them the Benefits of *Coons I*.

In *Coons II*, the New Jersey Supreme Court decided that Honda and the corporate *amici* who supported its position should be denied the benefits of *Coons I* on the grounds that they are "institutional litigants," *i.e.*, "of a class that will in the future frequently have resort to the statute of limitations . . . ." (App. 18a.) This is inconsistent with federal law. With a very few exceptions, this Court has always applied even otherwise wholly prospective decisions to the parties who established the new rule. *E.g.*, *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967); *United States* v. *Peltier*, 422 U.S. 531, 542 n.12 (1975) (where it has been determined that new decision is not to be retroactively applied, "it has not been questioned" that new rule applies to parties in case establishing it); *id.* at 548 n.6 (Brennan, J., dissenting) ("Of course, we have always given the benefit of a criminal procedure decision to the defendant in whose case the principle was announced."). This principle is not limited to criminal, or even constitutional, decisions. The new federal statutory rule applied prospectively in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), was applied to the parties who established it. *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352, 366 (1969). So too, the Commerce Clause decisions in *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974), and similar cases were applied to the parties before the Court.

The primary reason for this principle of federal law—that the parties who establish a new rule are entitled to benefit from it—is to provide an incentive and reward to those who challenge invalid statutes and doctrines. *Stovall* v. *Denno*, *supra*, 388 U.S. at 301. In this case, Honda has litigated the constitutionality of the tolling statute for over six years—before the Appellate Division

of the New Jersey Superior Court, before this Court, and twice before the New Jersey Supreme Court. When this Court remanded this case to the New Jersey courts for consideration of the statutory and Commerce Clause issues, Honda—through four briefs and two oral arguments—helped answer those questions. These efforts should be rewarded. Similarly, the corporate *amici* who supported Honda were instrumental in *Coons I* and *Coons II*, as the New Jersey Supreme Court acknowledged.[22] They, too, deserve to be rewarded for their efforts. That Honda and the corporate *amici* are, in the words of the New Jersey Supreme Court, "institutional litigants," and thus may at some future time have occasion to raise a statute of limitations defense in New Jersey, is insufficient under federal law to deny them all benefits of *Coons I* until that time.

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[22] In addition to Brinco Mining Limited, *amici* supporting Honda before the New Jersey Supreme Court included G.D. Searle & Co. and Kelsey-Hayes Company. Brinco's longstanding interest in the issues raised here is set forth in n.1, *supra*. Searle and Kelsey-Hayes were parties in cases before this Court (see n.5, *supra*). Searle submitted *amicus* briefs in *Coons I* and *Coons II* and participated in oral argument on the merits in *Coons II*; Kelsey-Hayes submitted an *amicus* brief in *Coons II*. The majority in *Coons II* recognized that Searle and Kelsey-Hayes "originated" the Commerce Clause argument adopted in *Coons I*, and that Brinco "with great tenacity and persistence [has] espoused the cause." (App. 18a.) Justice Garibaldi came to the same conclusion in her dissent. (App. 22a.) ("The *amici* likewise have engaged in an extraordinarily protracted and tenacious pursuit of this issue . . . .")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 11, 1984

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FILED
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CLERK

84-385

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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APPENDIX A

SUPREME COURT OF NEW JERSEY

September Term 1982

A-87

WALTER P. COONS,
Plaintiff-Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC., a corporation, *et al.*,
Defendants,

and

HONDA MOTOR COMPANY, LTD. OF JAPAN, a corporation,
Defendant-Respondent,

and

ATTORNEY GENERAL OF NEW JERSEY,
Intervenor-Respondent.

Argued January 24, 1984 Decided June 13, 1984

On a rehearing of a portion of the judgment of this Court, dated August 3, 1983 and reported at 94 *N.J.* 307 (1983). See 95 *N.J.* 234 (1984).

Robert H. Jaffe argued the cause for petitioner (*Jaffe & Schlesinger*, attorneys; *Mr. Jaffe* and *Howard G. Schlesinger*, on the brief).

Harry Haushalter, Deputy Attorney General, argued the cause for intervenor-respondent (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney; *James J. Ciancia*, Assistant Attorney General, of counsel).

John I. Lisowski argued the cause for respondent Honda Motor Company, Ltd. of Japan, etc. (*Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski*, attorneys; *Mr. Lisowski* and *Paul A. Lisovicz*, on the brief).

Karl Asch argued the cause for *amicus curiae pro se* (*Mr. Asch*, attorney; *Mr. Asch* and *Philip A. Tortoreti*, on the briefs).

I. Michael Greenberger, a member of the District of Columbia bar, argued the cause for *amicus curiae* Brinco Mining Limited (*Robinson, Wayne, Levin, Riccio & La Sala*, attorneys; *Mr. Greenberger, Susan S. Collins* and *Elizabeth Runyan Geise*, members of the District of Columbia bar, of counsel).

Raymond M. Tierney, Jr., argued the cause for *amicus curiae* G.D. Searle & Co. (*Shanley & Fisher*, attorneys; *Mr. Tierney* and *Susan M. Sharko*, on the brief).

Walter R. Cohn submitted a brief on behalf of *amicus curiae* Walter Cohn and Susan Cohn (*Walter R. Cohn*, attorney; *Thomas E. Cohn*, on the brief).

George J. Botcheos submitted a brief on behalf of *amicus curiae* Kelsey-Hayes Company (*Laskin & Botcheos*, attorneys; *Lowell A. Reed, Jr.*, and *Patricia A. Mattern*, members of the Pennsylvania bar, of counsel).

William H. Sheil submitted a brief on behalf of *amicus curiae* Association of Trial Lawyers of America, New Jersey affiliate (*Kronisch & Schkeeper*, attorneys).

J. Llewellyn Mathews submitted a brief on behalf of *amicus curiae* Roy Allen Hopkins (*Apell and Mathews*, attorneys).

The opinion of the Court was delivered by CLIFFORD, J.

In *Coons v. American Honda Motor Co.*, 94 *N.J.* 307 (1983) (*Coons I*), this Court addressed the constitutionality of *N.J.S.A.* 2A:14-22 in the face of an attack under the commerce clause, U.S. Const. art. 1, § 8, cl. 3. That statute tolls the running of the statute of limitations in actions against foreign corporations not represented in this state. We ruled that in order to achieve representation under the tolling statute, a corporation not organized in New Jersey and not represented in this state by any person upon whom process may be served must obtain a certificate to do business in New Jersey, pursuant to *N.J.S.A.* 14A:13-4, and thereby submit to the jurisdiction of the forum. 94 *N.J.* at 309. We further held that to require an unrepresented foreign corporation to satisfy that provision before it could gain the benefit of the statute of limitations imposed on such a corporation so impermissible a burden as to amount to a violation of the commerce clause. *Id.* Finally, we stated that our decision was to be given retrospective effect, "consistent with the general rule applied in civil cases that a new ruling shall apply to all matters that have not reached final judgment." 94 *N.J.* at 319 (citing *Fox v. Snow*, 6 *N.J.* 12, 14 (1950)).

Following our decision in *Coons I*, plaintiff filed a petition for rehearing on all the issues that had been determined in that appeal. We directed defendant to respond solely on the question of retroactivity, and invited other counsel to address the same issue. The positions staked out in the supplemental briefs found plaintiff, supported by *amici curiae* Walter and Susan Cohn, Roy Hopkins, Karl Asch, P.A., and ATLA-NJ (The Association of Trial Lawyers of America, New Jersey Affiliate), arguing that our ruling should be prospective in application, a position shared by the Attorney General as intervenor-respondent. Defendant, who contends that *Coons I* should be applied retroactively, is joined by

amici curiae G.D. Searle & Co., Kelsey-Hayes Company, and Brinco Mining Limited.[1]

We granted the petition for rehearing, —— *N.J.* —— (January 3, 1984), limited to the retroactivity issue. We now hold as a matter of state law that *Coons I* is to be applied prospectively only, from the date of that decision, August 3, 1983.

I

In order that the issue may be set forth in the proper context, we advert to the significant facts and procedural history, borrowing at the outset from our recitation in *Coons I, supra*, 94 *N.J.* at 309.

> Plaintiff commenced this suit in 1978 against defendant Honda Motor Co., Ltd. (Honda) and its wholly-owned American distributor, American Honda Motor Co., Inc. (American Honda). The action seeks damages for personal injuries and consequential losses occasioned by an accident on October 30, 1974, when plaintiff was thrown from a motorcycle manufactured by Honda and distributed by American Honda. At all relevant times American Honda was a California corporation that maintained facilities in New Jersey. In contrast, Honda is a Japanese corporation that has never been authorized to do business in this or any other state and carries on no activities here or elsewhere in the United States.
>
> Because plaintiff had started suit four years after the accident, both Honda and American Honda raised as a defense the two-year statute of limitations for personal injury actions, *N.J.S.A.* 2A:14-2, and moved for summary judgment. The trial court

---

[1] The various *amici* are interested in the outcome of this appeal as it affects other litigation, including many asbestos exposure cases, to which they are party or in which they represent parties. *Amicus* ATLA-NJ expresses a concern "for the numerous people who are or will * * * become directly affected by the ultimate decision in this case * * *."

granted American Honda's motion but denied that of Honda, ruling that the two-year statute of limitations had been tolled by *N.J.S.A.* 2A:14-22 because Honda was a foreign corporation that was not "represented" in New Jersey by a person upon whom process could be served. In addition, the trial court held that there were sufficient bases for the exercise of *in personam* jurisdiction against Honda and that the tolling statute did not violate the equal protection clause of the federal Constitution.

The Appellate Division affirmed the judgment of the trial court. *Coons v. Honda Motor Co., Ltd., of Japan*, 176 *N.J.Super.* 575 (1980). After this Court denied cross-motions for leave to appeal, the parties sought review by the Supreme Court, which consented to hear only Honda's appeal. That Court vacated the judgment below and remanded to the Appellate Division. *Honda Motor Co., Ltd. v. Coons*, 455 *U.S.* 996, 102 *S.Ct.* 1625, 71 *L.Ed.*2d 857 (1982). Thereafter we certified the cause on our own motion. *R.* 2:12-1.

[*Id.* at 309-11 (footnote omitted).]

The Supreme Court's remand was designed to afford the state court the opportunity to reconsider its earlier determination in light of *G.D. Searle & Co. v. Cohn*, 455 *U.S.* 404, 71 *L.Ed.*2d 250 (1982). In *Searle*, Susan and Walter Cohn sought damages allegedly caused by Enovid, an oral contraceptive manufactured by Searle, a Delaware corporation not authorized to do business in New Jersey, with its principal place of business in Illinois. Upon plaintiffs' filing suit, more than ten years after the injury, in the Superior Court of New Jersey, later removed to the District Court, Searle set up as a defense the two-year statute of limitations. Judge Meanor found that the tolling provision relied on by the Cohns violated the equal protection clause. *Cohn v. G.D. Searle & Co.*, 447 *F.Supp.* 903, 912 (1978).

Issues substantially identical to those raised in *Searle* surfaced some months later in *Hopkins v. Kelsey-Hayes, Inc.*, 463 *F.Supp.* 539 (D.N.J. 1978). In that case District Court Judge Brotman expressly rejected the reasoning of Judge Meanor in *Searle* and found that *N.J.S.A.* 2A:14-22 withstood constitutional scrutiny under the equal protection clause. *Id.* at 542.

Prior to a decision in the consolidated appeal of *Hopkins* and *Searle* in the United States Court of Appeals for the Third Circuit, *Hopkins v. Kelsey-Hayes, Inc.*, 628 *F.*2d 801 (1980), this Court decided *Velmohos v. Maren Eng'g Corp.*, 83 *N.J.* 282 (1980), in which we upheld the tolling provision in the face of equal protection and due process challenges. The Third Circuit then adopted the *Velmohos* rationale and rejected defendants' constitutional attacks, 628 *F.*2d at 811-12.

Both Searle and Kelsey-Hayes sought certiorari in the United States Supreme Court, which granted the petition of Searle, filed one day earlier than that of Kelsey-Hayes. The Court held that *N.J.S.A.* 2A:14-22 withstood constitutional scrutiny arising under equal protection and due process of law. Justice Blackmun, writing for the majority, did not, however, decide the issue raised by Searle's commerce clause argument. Because that issue was "clouded by an ambiguity in state law", 455 *U.S.* at 413, 71 *L.Ed.*2d at 259, the Court instead remanded the case to the Third Circuit, along with *Kelsey-Hayes* after vacating the judgment in that case. 455 *U.S.* ——, 71 *L.Ed.*2d 844 (1981) (mem.). In a single decision the Third Circuit remanded both *Searle* and *Kelsey-Hayes* to the District Court for resolution of the commerce clause question. *Hopkins v. Kelsey-Hayes, Inc.*, 677 *F.*2d. 301, 302 (1982). When the Supreme Court remanded *Coons* to the state court for determination of the commerce clause issue in light of *Searle*, the District Court adjourned its consideration of the same question pending a binding interpretation on a question of state law, namely, the

requirement of "representation" in our tolling statute, *N.J.S.A.* 2A:14-22. There followed our decision in *Coons I.*

As long ago as 1940 Chief Justice Charles Evans Hughes lamented that questions of retroactivity had for years been considered "among the most difficult" problems that engage the attention of the courts, both state and federal. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 *U.S.* 371, 371, 84 *L.Ed.* 329, 333. That the passage of time and a maturing of retroactivity law have not rendered those issues any the less vexatious is borne out by our experience in this case, in which after earnest reflection, aided by full briefing and argument, we now view as ill-considered our earlier statement (made without the benefit of an adversary hearing directed to the point) that gave *Coons I* retrospective effect. We are brought to that conclusion by application of principles drawn from our own state court decisions as well as from United States Supreme Court cases.

There are four common approaches to retroactivity that have emerged from our case law. A court may:

> (1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues of direct review; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues of direct review exhausted.
>
> [*State v. Burstein*, 85 *N.J.* 394, 402-03 (citing *State v. Nash*, 64 *N.J.* 464, 468-70 (1974)).]

Which of these approaches is taken depends largely on "the court's view of what is just and consonant with public policy in the particular situation presented." *State v. Nash*, 64 *N.J.* 464, 469 (1974). Most frequently "a weighing of the various policies involved [has] called for retrospectivity", *Darrow v. Hanover Twp.*, 58 *N.J.* 410, 413-14 (1971). Consequently, retrospectivity is acknowledged to be the "traditional" rule, *see, e.g., Mirza v. Filmore Corp.*, 92 *N.J.* 390, 396 (1983); hence our reference in *Coons I* to the "general rule" of retrospectivity as adverted to in *Fox v. Snow*, 6 *N.J.* 12, 14 (1950). 94 *N.J.* at 319

However, as suggested by *Nash, supra*, 64 *N.J.* at 469, sound policy reasons may persuade a court to accord a judicial decision prospective application. Under the rubric of *Nash*, followed in numerous cases since then, "sound policy grounds" may justify limiting the retroactive effect of overruling precedent. See *id.* at 471. They are (1) justifiable reliance by the parties and the community as a whole on prior decisions, (2) a determination that the purpose of the new rule will not be advanced by retroactive application, and (3) a potentially adverse effect retrospectivity may have on the administration of justice. *Mirza v. Filmore Corp., supra*, 92 *N.J.* at 397; *see, e.g., State v. Catania*, 85 *N.J.* 418, 447 (1981); *State v. Burstein, supra*, 85 *N.J.* at 406; *State v. Carpentieri*, 82 *N.J.* 546, 549 (1980).

Although more than one retroactivity analysis is available—in fact, as one scholar has recently pointed out, "there are several, with the precise number unclear and possibly changing", Corr, "Retroactivity: A Study in Supreme Court Doctrine 'As Applied'," 61 *N.C.L.Rev.* 745, 761 (1983)—it appears that New Jersey retroactivity law has been inspired by the same considerations that underlie retroactivity theory as developed by the Supreme Court. See *State v. Gervasio*, 94 *N.J.* 23 (1983); *Salorio v. Glaser*, 93 *N.J.* 447 (1983). On the specific

issue before us—whether a civil statute's invalidity is to be applied prospectively or retroactively—the Supreme Court has developed an equitable balancing test, perhaps best typified by *Chevron Oil Co. v. Huson*, 404 *U.S.* 97, 30 *L.Ed.*2d 296 (1971), and *Lemon v. Kurtzman*, 411 *U.S.* 192, 36 *L.Ed.*2d 151 (1973) (*Lemon II*).

Chevron involved a claim for personal injuries sustained while plaintiff was working on defendant's drilling rig located on the Outer Continental Shelf off the Gulf Coast of Louisiana. The suit was filed more than two years after plaintiff's accident. Louisiana had a one year statute of limitations governing personal injury suits. Originally, defendant did not raise a statute of limitations defense because the parties assumed, on the basis of a long line of federal decisions, that admiralty law—including the doctrine of laches—applied to the case. During discovery, however, the Supreme Court announced its decision in *Rodrigue v. Aetna Casualty & Sur. Co.*, 395 *U.S.* 352, 23 *L.Ed.*2d 360 (1969), that state law, including state statutes of limitations, rather than admiralty law applied to personal injury actions brought under the Outer Continental Shelf Lands Act, relating to fixed structures on the Outer Continental Shelf. The District Court in *Chevron*, relying on *Rodrigue*, applied the Louisiana one-year limitations period and dismissed the case. The Circuit Court reversed and remanded for trial. In affirming that result the Supreme Court ruled that *Rodrigue* should be applied prospectively. The Court articulated three factors that influenced its decision:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the

> rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." * * * Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."
>
> [404 *U.S.* at 106-07, 30 *L.Ed.*2d at 306 (citations omitted).]

Justice Stewart observed that inasmuch as *Rodrigue* not only was a case of first impression but also overruled prior lower court decisions that were binding, it was to be expected that plaintiff would rely on the law as it was "[w]hen [he] was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings * * *." *Id.* at 107, 30 *L.Ed.*2d at 306. The Court pointed to the substantial inequitable results that would be produced were *Rodrigue* given retroactive effect, since plaintiff stood to be barred from further relief because of a sudden change in the applicable statute of limitations. *Id.*

In *Lemon v. Kurtzman*, 403 *U.S.* 602, 29 *L.Ed.*2d 741 (1971) (*Lemon I*), the Supreme Court invalidated a Pennsylvania statutory program to reimburse nonpublic sectarian schools for designated secular educational service. In *Lemon II*, *supra*, 411 *U.S.* 192, 36 *L.Ed.*2d 151, the Court held that *Lemon I* should be accorded prospective effect. Chief Justice Burger, repeating *Chevron*'s comment that the Supreme Court had come to recognize the doctrine of non-retroactivity outside the criminal area many times, in both constitutional and non-constitutional cases, 411 *U.S.* at 197, 36 *L.Ed.*2d at 159-60, emphasized that reliance interests weigh heavily in the shaping of appropriate equitable relief. *Id.* at 203, 36 *L.Ed.*2d at 163. Particularly pertinent to today's inquiry is the Court's observation that "statutory or even

judge-made rules of law are hard facts on which people must rely in making decisions and shaping their conduct." *Id.* at 199, 36 *L.Ed.*2d at 160.

That *Chevron*'s underscoring of reliance continues as a significant feature of retroactivity analysis at the federal level is clear from *Wachovia Bank & Trust v. National Student Mktg.*, 650 *F.*2d 343 (D.C. Cir. 1980). The result in that case, which involved a suit under the federal securities law, turned on a determination of which of two statutes of limitations applied. Although the court had recently applied the shorter of the two, at the time the cause of action arose and plaintiff filed suit, the longer limitations period had been in use. Finding *Chevron*'s reliance factor to be "the most fundamental," 650 *F.*2d at 347, the court concluded that plaintiff was entitled to rely on the law as it was when suit was started. *Id.* at 348.

The development of New Jersey's retroactivity law has proceeded on a track roughly paralleling that represented by the cases discussed above. Indeed, one might fairly claim that *Oxford Consumer Discount Co. v. Stefanelli*, 104 *N.J.Super.* 512 (App. Div. 1969), modified, 55 *N.J.* 489, appeal dismissed, 400 *U.S.* 923, 27 *L.Ed.*2d 182 (1970), anticipated the *Chevron* and *Lemon II* analysis, at least to the extent of its heavy emphasis on the element of reliance.

> There is no question but that appellate courts in this State and elsewhere have long regarded themselves as empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective application if considerations of fairness and justice, related to reasonable surprise and prejudice to those affected, seemed to call for such treatment.
>
> [104 *N.J.Super.* at 520.]

Our continued regard for the "reliance" factor is demonstrated by last term's decision in *Salorio v. Glaser*, 93 *N.J.* 447 (1983), *cert.* denied, 52 *U.S.L.W.* 3422 (U.S. Nov. 28, 1983) (No. 83-353), in which a unanimous Court declared the Emergency Transportation Tax Act, *N.J.S.A.* 54:8A-1 to -57, to be unconstitutional. In recognition, however, of the state's fiscal problem and of its reliance on the taxing statute as a significant revenue-raising law, we applied our ruling prospectively to allow the taxing authorities to collect the tax until January 1, 1984. Resorting to authority in support of the decision to invalidate statutory law, Justice Schreiber wove together the equitable considerations espoused in *Lemon II*, *supra*, 411 *U.S.* 192, 36 *L.Ed.*2d 151, and *Oxford Consumer Discount*, *supra*, 104 *N.J.Super.* 512, to find that fairness and reliance warranted prospective application. 93 *N.J.* at 464-65.

For other cases involving prospective application of decisions, see *New Jersey Bd. of Higher Educ. v. Shelton College*, 90 *N.J.* 470, 490 (1982) (enjoining unlicensed college from granting degrees but allowing award of credits and degrees to junior and senior students in recognition of students' pursuit of educational goals in "good faith" reliance on credibility of institution); *Passaic v. Local Fin. Bd.*, 88 *N.J.* 293, 303 (1982) (despite municipality's possible lack of good faith in adopting emergency appropriation request in violation of *N.J.S.A.* 40A:4-46, Court would not review appropriation and financing inasmuch as expenditures in reliance thereon could not be undone); *Jersey Shore v. Estate of Baum*, 84 *N.J.* 137, 152 (1980) (common-law principle of protecting wife from liability for husband's necessary expenses, without according similar protection to husband, invalidated on equal protection grounds; holding applied prospectively only to debts incurred after date of decision because of "primary factor" of "[r]eliance on the prior law"); *Barone v. Harra*, 77 *N.J.* 276, 281 (1978) (in view of reliance on prior law, Court's holding of com-

pensability under workers' compensation law for injuries sustained during lunch period applied prospectively); *Merenoff v. Merenoff*, 76 *N.J.* 536, 560 (1978) (abolition of interspousal tort immunity in personal injury actions applied prospectively); *Tomarchino v. Township of Greenwich*, 75 *N.J.* 62, 78 (1977) (invalidation of proof of dependency requirement in workers' compensation statute applied prospectively); *Mercer Council #4 v. Alloway*, 119 *N.J.Super.* 94, 101 (despite invalidation of Civil Service Commission rule, Commission's "substantial * * * reliance to date" on rule justified declaration that all prior actions as well as actions to be taken within 45 days of court's opinion would be valid), aff'd, 61 *N.J.* 516 (1972); *Darrow v. Hanover Twp., supra*, 58 *N.J.* at 420 (abrogation of interspousal tort immunity in automobile negligence actions applied prospectively).

III

In applying to this case the principles discussed in the preceding section, we are mindful of two admonitions in *Salorio v. Glaser, supra*, 93 *N.J.* 447. The first is perhaps obvious: that the ruling, the retrospective-prospective application of which is at issue, must be "the equivalent of a new rule of law." *Id.* at 464-65; see *State v. Burstein, supra*, 85 *N.J.* at 403 ("As the very term implies, retroactivity can arise only where there has been a departure from existing law."). The second may be more subtle but is of equal significance:

> It is important to recognize that we are acting within the framework of appropriate equitable relief with respect to an unconstitutional * * * statute and not with regard to the retrospective effect of a new rule of criminal procedure, *United States v. Johnson*, 457 *U.S.* 537, 102 *S.Ct.* 2579, 73 *L.Ed.* 2d 202 (1982); or a substantive constitutional principle, *United States v. United States Coin & Currency*, 401 *U.S.* 715, 91 *S.Ct.* 1041, 28 *L.Ed.*2d 434

(1971); or a rule of judge-made law applicable to civil proceedings, *Mirza v. Filmore Corp.*, 92 *N.J.* 390 (1983); *Cogliati v. Ecco High Frequency Corp.*, 91 *N.J.* 402 (1983). Factors that may be relevant in the criminal field, such as integrity of the judicial process, impairment of the basic purpose of the jury to determine the truth, or in the common law in civil matters in which other policy considerations are involved, may or may not be applicable here.

[93 *N.J.* at 463-64.]

The concerns expressed in this passage are related to what factors we select and what approach we take in deciding the issue before us. Defendant and the corporate *amici* argue that because our earlier ruling did not represent a "clear break with the past"—a prerequisite to prospectivity under *United States v. Johnson*, 457 *U.S.* 537, 73 *L.Ed.*2d 202 (1982)—we must give retroactive effect to *Coons I*. We do not agree.

Johnson held that, subject to limited exceptions, "a decision of [the Supreme] Court construing the Fourth Amendment [was] to be applied to all convictions that were not yet final at the time the decision was rendered." 457 *U.S.* at 562, 73 *L.Ed.*2d at 222. A fourth-amendment decision was to be applied retroactively unless it represented a "clear break with the past," as to which the Court said:

> Such a break has been recognized only when a decision (1) explicitly overrules a past precedent of this Court, or (2) disapproves a practice this Court arguably has sanctioned in prior cases, or (3) overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.
>
> [*Id.* at 551, 73 *L.Ed.*2d at 215 (citations omitted).]

Because, in the case before us, the law concerning the effect of the tolling statute on unlicensed foreign corporations was, at best, uncertain at the time plaintiff and the claimant-*amici* started suit, defendant argues that *Coons I* does not represent a "clear break" in any of the senses contemplated by *Johnson*.

Although this Court has adopted the *Johnson* "clear break" test in the context of a fourth amendment retroactivity issue, see *State v. Gervasio*, *supra*, 94 *N.J.* 23, we have not looked to strict "clear-break" analysis in the civil context, where the emphasis has been on considerations of fundamental fairness and justice. *See, e.g.*, *Salorio v. Glaser*, *supra*, 93 *N.J.* 447. Indeed, the final point of *Johnson* itself is that "all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron* * * *". 457 *U.S.* at 562, 73 *L.Ed.*2d at 222-23. And *Chevron*, as we have seen, *supra* at —— (slip op. at 13), tells us that for a decision to be applied non-retroactively, it is sufficient that it establish a new principle of law, "either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed." See *Johnson*, *supra*, 457 *U.S.* at 550 n.12, 73 *L.Ed.*2d at 214 n.12. *Chevron* does not use "clear-break" language. *See also Solem v. Stumes*, 55 *U.S.L.W.* 4307 (U.S. Feb. 29, 1984) (No. 81-2149) (affording prospective application to *Edwards v. Arizona*, 451 *U.S.* 477, — *L.Ed.*2d — (1984), which established *per se* rule that once suspect has invoked right to counsel, any subsequent initiation of conversation by one other than suspect violates that right; held, police could reasonably have relied on pre-*Edwards* law, which inquired into facts of each case, even though state of that law was unsettled; despite absence of "clear break," *Edwards* did establish new rule).

It is clear that *Coons I* satisfied the *Chevron-Salorio* formulation of how the requirement of establishing a

new principle of law may be met. We must look to the law as it was at the time plaintiff contemplated starting suit, namely, 1978. *See Wachovia Bank & Trust v. National Student Mktg., supra*, 650 *F.*2d at 347. In 1978 *N.J.S.A.* 2A:14-22 was in full bloom. It had been on the books since 1949, see *Coons I, supra*, 94 *N.J.* at 313, and a tolling provision in some form had been a fixture of our law for over a century and a half, its origins being traceable to 1820, see *Lemke v. Bailey*, 41 *N.J.* 295, 298 (1963). After *Coons I*, however, there was effectively no tolling provision for foreign, unrepresented corporations.

Until 1980, in *Velmohos v. Maren Eng'g Corp., supra*, 83 *N.J.* 282, this Court had not addressed the effect of *N.J.S.A.* 2A:14-22 on corporate defendants, having specifically declined to do so in *Lemke v. Bailey, supra*, 41 *N.J.* at 301. And although, as pointed out in both *Lemke, id.*, and *Velmohos, supra*, 83 *N.J.* at 286, that issue had yielded contradictory results in trial court decisions, *compare Ferraro v. Ferro Trucking Co., Inc.*, 72 *N.J.Super.* 519 (Law Div. 1962), *with Whalen v. Young*, 28 *N.J.Super.* 543 (Law Div. 1953), no appellate court anywhere had even hinted at a commerce clause problem until the Supreme Court's decision in *G.D. Searle & Co. v. Cohn, supra*, 455 *U.S.* 404, 71 *L.Ed.* 2d 250. Up to that point the only reported mention of commerce clause implications was tucked away in Judge Meanor's footnote in his *Searle* opinion, 447 *F.Supp.* at 911 n.17. Hence, the declaration of *Coons I* was hardly foreshadowed; and although the case did not literally alter precedent because there was none on the *holding* of the case, it amounted to a "statement" in a matter of first impression—and thus "new law."

> The overruling of prior judicial construction of a statute is generally not given retroactive effect, even as legislative change itself normally applies only prospectively. Although we are not literally altering

> precedent, the principle in this matter of first impression appears to us to be indistinguishable in view of that which appears almost incontestably to have been a not wholly unreasonable reliance on a contrary doctrine.
>
> [*Turner v. Aldens, Inc.*, 179 *N.J.Super.* 596, 605 (App. Div. 1981) (citation omitted).]

Turning to the critically important factor of reliance, we focus at the outset on what it is that litigants "may have relied" on in 1978—a long-standing statute that announces that as to foreign, unrepresented corporations, no action need be taken. The effect of the statute is to give assurance that causes of action against foreign, unrepresented corporations will be preserved. In a sense its underlying subject is non-action. To be sure, it would be most difficult, if not impossible, to forecast the number of claimants who might be affected by a holding that *Coons I* should be applied retroactively or, as the Attorney General points out, to measure "the extent and nature of the prejudice to be suffered by those potential plaintiffs who justifiably relied on the validity of the tolling statute."

Despite those difficulties, we conclude that given the nature of this statute, we are justified in presuming that because of the tolling feature, many suits may not have been brought against unrepresented foreign corporations. The foreign corporations did not take any action to avoid whatever vulnerability the enactment created; they did not register in New Jersey. The history of non-action by both those corporations and potential plaintiffs satisfies us that participants in the events before us ordered their affairs in accordance with the tolling statute.

Moreover, this conclusion has the virtue of practicability: we cannot construct a workable rule by questioning, in each case, whether the particular plaintiff has successfully demonstrated actual reliance. Some level of

generality is required. The result we achieve satisfies that need while at the same time honoring the equitable considerations that must inform our decision.

Finally, following *Chevron, supra*, 404 *U.S.* at 106-07, 30 *L.Ed.*2d at —, we look to the purpose of the rule in *Coons I.* In its starkest terms, that determination had as its purpose the outlawing of so much of the tolling statute as violates the commerce clause. Defendant contends that not to apply the ruling retroactively would be to countenance unconstitutionality. But the argument overlooks the balancing of interests and impact, called for by our commitment to equitable principles. Those concerns are addressed above—the reliance of plaintiff and those similarly situated, and the absence of any showing that in fact defendant and corporate *amici* suffered a burden borne of a compulsion to register in New Jersey to permit recourse to the statute of limitations. On balance we are satisfied that the purpose of the prior ruling is fulfilled by excluding from the scope of the *Coons I* ruling only those actions already commenced as of August 3, 1983.

That leaves for determination only the question of whether *Honda*, as the successful litigant in *Coons I*, or any of the corporate *amici* as champions of the cause, should be given the benefit of the ruling in *Coons I.* We conclude not. Prospectivity is to be accorded "across the board." Whereas ordinarily the fruits of the struggle are awarded the successful litigant, and likewise to one—here Searle and Kelsey-Hayes—with whom the prevailing theory originated or who, like Brinco, has with great tenacity and persistence espoused the cause—we perceive no injustice in limiting the operative time of *Coons I* to the date of that decision, August 3, 1983. Defendant and *amici* are institutional litigants. They are of a class that will in the future frequently have resort to the statute of limitations, unimpeded by so much of *N.J.S.A.* 2A:14-22 as deprived them of that benefit. In

addition, the hiatus effected by our conclusion in this regard affords the Legislature an opportunity to address any public policy concerns that are implicated by *Coons I*.

Our prior judgment in *Coons I*, under the terms of which the cause was remanded to the Law Division for entry of judgment for defendant Honda, is modified. *Coons I* is to be made effective as of August 3, 1983—that is, the statute of limitations as to foreign, unrepresented corporations commences to run as of that date. The cause is remanded to the Law Division for further proceedings consistent with this opinion.

Chief Justice Wilentz and Justices Handler and O'Hern join in this opinion. Justice Garibaldi has filed a separate dissenting opinion in which Justices Schreiber and Pollock join in Part I.

GARIBALDI, J., dissenting.

On August 3, 1983 in *Coons v. American Honda Motor Co.*, 94 *N.J.* 307 (1983) (*Coons I*), we held that *N.J.S.A.* 2A:14-22 imposes an unconstitutional burden on interstate commerce in violation of the commerce clause, U.S. Const. art. 1, § 8, cl. 3. We further stated that this decision "should be given retrospective effect, consistent with the general rule applied in civil cases that a new ruling shall apply to all matters that have not reached final judgment." *Id.* at 319. Today, less than 8 months later, the majority reverses our decision in *Coons I* with respect to retroactivity and holds that the decision in *Coons I* should be applied prospectively to all parties from the date of that decision August 3, 1983. We disagree.

Justices Schreiber and Pollock would apply our decision in *Coons I* retroactively to all parties presently before the Court including *amici*: G.D. Searle & Co., Kelsey-Hayes Co. and Brinco Mining Limited, but would apply the decision prospectively as to everyone else. I

agree with my dissenting brethren, but would go further and accord our *Coons I* decision retroactive effect "across the board."

I

Irrespective of the general retroactivity of the *Coons I* decision, there should be no question that those responsible for effecting the change in law should benefit by their efforts. It has long been the position of this Court that "fundamental fairness" compels that "champions of the cause" should be rewarded for their effort and expense in challenging existing law. We need private attorneys to push forward the frontiers of the law, but we will not have them if they stand to gain nothing through their efforts.

As we have held in *Goldberg v. Traver*, 52 *N.J.* 344, 347 (1968), "[u]nless the immediate litigant can hope to gain, there would be no incentive to challenge existing practices or prior holdings which, in the public interest ought to be reviewed." And as Chief Justice Weintraub observed in *Willis v. Department of Cons. & Econ. Dev.*, 55 *N.J.* 534, 541 (1970):

> As to the plaintiffs in this case, the decision should be applied, and this for the practical reason that case law is not likely to keep up with the needs of society if the litigant who successfully champions a cause is left with only that distinction.

This Court set forth similar policy reasons when we held that our decisions would be prospectively applied, except as to the litigants before the Court, in the following cases: *Cogliati v. Ecco High Frequency Corp.*, 92 *N.J.* 402, 417 (1983) (decisions extending responsibility of predecessor in title for maintenance of public sidewalks, applied prospectively except as to parties); *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 82-83 (1982) (overruling of prior decision in *Point Pleasant Beach Teachers' Ass'n v. Callan*, 173 *N.J.Super.* 11,

certif. den., 84 *N.J.* 469 (1980), applied prospectively except as to parties before court); *Pascucci v. Vagott*, 71 *N.J.* 40, 50-51 (1976) (setting aside of classification standards under welfare statute applied prospectively except as to litigants); and *Darrow v. Hanover Township*, 58 *N.J.* 410, 420 (1971) (abrogation of doctrine of interspousal immunity in automobile negligence cases applied prospectively except as to litigants).

Recently, we held that as a matter of fundamental fairness a new rule of strict liability in a products liability case should be extended to all plaintiffs similarly situated. *Ramirez v. Amsted Industries*, 86 *N.J.* 332 (1981). In *Ramirez* we said:

> Therefore, we apply the new rule to the present case and its companion, *Nieves v. Bruno-Sherman Corp. & Harris Corp.*, 86 *N.J.* 361. Moreover, we conclude that on balance *and as a matter of fundamental fairness*, the benefit of today's rule should be extended to other similarly situated plaintiffs with products liability suits against successor manufacturers affected by this rule, which suits were in progress as of November 15, 1979, the date of the Appellate Division decision. There is a *basic justice* in recognizing that persons who have exercised the initiative to challenge the existing law should be accorded relief if their claims—not yet resolved when the new rule of law is announced—are ultimately vindicated. (emphasis added) [*Id.* at 357.]

The fundamental principles of basic fairness contemplated by this Court in *Ramirez* are particularly appropriate in the instant case. For years the parties here have waged protracted legal battles over the constitutionality of the tolling statute. Defendant Honda has been fighting this suit for over 5 years. It has been an extraordinarily hard fought battle in both the state and federal courts, as a brief history of the litigation demon-

strates. The majority opinion, *ante* at — (slip op. at 5-6), sets forth the procedural history of this case. That history reveals: arguments in this state's trial court and Appellate Division; denial of cross-motions for leave to appeal to this Court; vacation of the judgment and remand by the United States Supreme Court; certification by this Court on our own motion; our *Coons I* decision, declaring that the tolling statute unconstitutionally burdens interstate commerce and that our decision should be given retroactive effect; and finally, this case, *Coons II*, a rehearing of the retroactivity issue only. Even the most superficial glance at this procedural history indicates that the road to today's decision has been a tortuous one.

The *amici* likewise have engaged in an extraordinarily protracted and tenacious pursuit of this issue through the Federal District Court to the United States Court of Appeals and finally to the United States Supreme Court. As the majority recognizes, Searle and Kelsey-Hayes are the originators of the prevailing commerce clause theory and Brinco has persistently espoused the cause. *Ante* at — (slip op. at 26).

Certainly Searle and Kelsey-Hayes have "championed the cause." They have challenged the constitutionality of this statute longer than any other party. But for the Supreme Court decision in *G.D. Searle & Co. v. Cohn*, 455 *U.S.* 404, 102 *S.Ct.* 1137, 71 *L.Ed.*2d 250 (1982) and the subsequent remand of the *Coons* case, the commerce clause issue would not have been decided by this Court at this time.

Brinco likewise long has challenged the tolling statute's constitutionality. It joined the *Searle* case as an *amicus* in the Supreme Court and filed an *amicus* brief devoted exclusively to the commerce clause. After the Supreme Court remanded *Coons* to the Appellate Division in light of its decision in *Searle*, Brinco obtained leave to file an *amicus* brief and to argue before us.

Given the especially long and arduous history of this appeal, there is no valid reason to depart from established judicial principles. Basic justice and principles of fundamental fairness demand that the defendant and *amici* in this case have the *Coons I* decision applied retroactively to them. When a statute's unfair and discriminatory features render it offensive to the supreme law of our land, it is just to resolve the matter so that the challenging litigants be spared further constitutional deprivation. Only in this fashion may the unconstitutional burden which has heretofore been placed upon them be eradicated.

The majority's excuse for not applying these well-recognized standards to the defendant and *amici* is that they are institutional litigants and hence will suffer no injustice. Whatever merit attends that argument is insufficient to carry the day. All litigants should be treated equally before the courts. Moreover, defendant and *amici* certainly will suffer an injustice if *Coons I* is not applied to them retrospectively. Under today's decision not only the present plaintiffs in this action and in cases in which *amici* are involved will have an unconstitutional cause of action, but until August 3, 1985 (two years from our decision in *Coons I*) plaintiffs who have sat on their rights will be able to institute actions against these parties and impose additional unconstitutional burdens upon them.

II

While my fellow dissenters would limit the retroactive application of *Coons I* to the parties before the Court today, I would go further; I would hold that *Coons I* should be given complete retroactive effect. This Court has generally adhered to the principle that "the presumption is in favor of retrospectivity, and that presumption can be overcome only by a clear demonstration in a particular case that there are sound policy reasons for according to a judicial decision prospective application

only." *Cogliati v. Ecco High Frequency Corp., supra,* 181 *N.J.Super.* at 583. In my opinion, plaintiffs have failed to meet their burden of demonstrating good reasons for prospective application in this case. *See Mirza v. Filmore Corp.*, 92 *N.J.* 390, 396-97 (1983); *Busik v. Levine*, 63 *N.J.* 351, 360-61, app. dism. 414 *U.S.* 1106, 94 *S.Ct.* 831, 38 *L.Ed.*2d 733 (1973); *Darrow v. Hanover Township*, 58 *N.J.* 410, 413 (1971); *Fox v. Snow*, 6 *N.J.* 12, 14 (1950); *Ross v. Board of Chosen Freeholders of Hudson City*, 90 *N.J.L.* 522 (E. & A. 1917); *Goncalvez v. Patuto*, 188 *N.J.Super.* 629, 626 (App. Div. 1983); *Cogliati v. Ecco High Frequency Corp., supra*, 181 *N.J.Super.* at 582.

Our law of retroactivity is based on the same considerations that underlie retroactivity theory of the Supreme Court. In civil actions, we have recognized standards similar to the tests set forth in *Chevron Oil Co. v. Huson*, 404 *U.S.* 97, 92 *S.Ct.* 349, 30 *L.Ed.*2d 296 (1971). In that case the Supreme Court looked to three factors to determine the retroactivity question: (1) whether the decision establishes a "new principle of law;" (2) whether retroactive operation of the decision would further or retard the purpose of the new rule; and (3) whether retroactive application would work an injustice upon those who had reasonably relied upon the old rule. 394 *U.S.* at 106-107, 92 *S.Ct.* at —, 30 L.Ed. 2d at 306; *see Mirza v. Filmore Corp.*, 92 *N.J.* 390, 397 (1983) (applying similar test when overruling prior judicial precedent in civil action); *see also State v. Burstein*, 85 *N.J.* 394, 406 (1981) (applying similar test in the context of changing interpretation of criminal statute).

The threshold issue in any retroactivity decision is whether or not a new rule of law or judicial principle has been announced. In defining the threshold question in the court context, we have consistently followed the liberal "new rule of law" standard set forth in *Chevron. See Salorio v. Glaser*, 93 *N.J.* 447, 465 (1983).

Although the tolling statute had been criticized and court decisions challenged its constitutionality, my review of the statute's history and the relevant cases leads me, as it did the majority, to conclude that our decision in *Coons I* amounted to a statement of first impression. Therefore, applying the first *Chevron* test, I agree with the majority that the decision in *Coons I* established a new rule of law.

My disagreement with the majority stems from my belief that it is improperly applying the second and third tests of *Chevron*. Turning to an examination of the second *Chevron* test, the prospective application of *Coons I* clearly frustrates the purpose of that decision. In applying *Coons I* prospectively, the majority ignores that its purpose was to strike down an unconstitutional statute. Today the majority countenances the very unconstitutionality that we sought to abrogate in *Coons I*. When the very law that prejudices the litigant cannot withstand a constitutional challenge, only extraordinarily strong policy reasons (as present in *Salorio*) justify limiting the new rule to prospective application.

The majority primarily bases its holding upon its analysis of the third *Chevron* factor and erroneously holds that retroactive application would be unjust to the plaintiff in this case because of his reliance upon the unconstitutional statute. An examination of the record discloses, however, that the parties in this case did not place any reliance whatsoever upon the tolling statute. Plaintiff Coons brought suit against Honda as soon as he realized that he had a cause of action; *Amicus* Cohn did not file suit immediately because he believed that the theory of causation was too tenuous. Finally, Roy Hopkins asserted that he was unaware that he might have a cause of action against Kelsey-Hayes, Inc., until after the statute of limitations had run.

Today the majority holds that actual reliance need not be shown, but that the potential for reliance is sufficient

to trigger a prospective application of the rule. *Ante* at —— (slip op. at ——). I disagree. In the past we have required a showing of actual reliance before limiting a new decision to purely prospective effect. *Wangler v. Harvey*, 41 *N.J.* 277, 286 (1963) (no evidence of actual reliance by defendant); *Arrow Builders Supply Corp. v. Hudson Terrace Apts.*, 16 *N.J.* 47, 50 (1954) (record contained nothing to suggest party actually relied upon old rule). I would require actual reliance or at least a reasonable likelihood of reliance before I would allow this factor to determine whether a decision should be applied retroactively or prospectively.

III

In conclusion, I still hold to our presumption of retroactivity. The reason for the presumption is that in most instances the advancement of the purpose of the new ruling is best served and the equities are not substantially disserved by applying the ruling to all actions. This general rule is clearly applicable to the present case.

Here the purpose of our ruling was to correct an unconstitutionally discriminatory statute. The Court's decision, to apply that ruling prospectively only, does nothing to advance the equities of this case since, as we have seen, the parties did not rely on the old rule. The decision, however, does delay the effect of the new rule, and thereby retards its purpose.

I would not give these or other plaintiffs who slept on their rights a windfall action allowing them to sue foreign corporations for another year without any showing that they either knew or relied on our statute. The proper remedy for these plaintiffs is the discovery exception to the statute of limitations. If they cannot succeed under that provision, they should not be allowed to succeed under this one. New Jersey cannot afford to create inconsistent decisions based on this Court's desire to give

a certain class of plaintiffs a remedy to which they are not entitled.

Justice Schreiber and Justice Pollock join in Part I of this opinion.

APPENDIX B

SUPREME COURT OF NEW JERSEY

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94 N.J. 307

WALTER P. COONS,
Plaintiff-Respondent,

v.

AMERICAN HONDA MOTOR CO., INC.,
a corporation, *et al.*,
Defendants,

and

HONDA MOTOR COMPANY, LTD. OF JAPAN, a corporation,
Defendant-Appellant,

and

ATTORNEY GENERAL OF NEW JERSEY,
Intervenor-Respondent.

Argued Feb. 23, 1983

Decided Aug. 3, 1983

John I. Lisowski, Livingston, for defendant-appellant (Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, Livingston, attorneys).

Robert H. Jaffe, Springfield, for plaintiff-respondent Jaffe & Schlesinger, Springfield, attorneys (Robert H. Jaffe, Howard G. Schlesinger, and Louis A. DiMare, Jr., Irvington, on the brief).

Harry Haushalter, Deputy Atty. Gen., for intervenor-respondent (Irwin I. Kimmelman, Atty. Gen., attorney; James J. Ciancia, Asst. Atty. Gen., of counsel; Harry Haushalter and Adrienne L. Isacoff, Deputy Atty. Gen., on the brief).

I. Michael Greenberger, Washington, D.C., a member of the Dist. of Columbia bar, for amicus curiae Brinco Min. Ltd. (Lum, Biunno & Tompkins, Newark, attorneys).

Raymond M. Tierney, Jr., Shrewsbury, submitted a brief on behalf of amicus curiae G.D. Searle & Co. (Shanley & Fisher, Newark, attorneys).

Walter R. Cohn, South Orange, submitted a brief on behalf of amici curiae Walter Cohn and Susan Cohn (Walter R. Cohn, attorney; Thomas E. Cohn, South Orange, on the brief).

Philip A. Tortoreti, Elizabeth, submitted a brief on behalf of amicus curiae Karl Asch, (Karl Asch, Elizabeth, attorney).

The opinion of the Court was delivered by

CLIFFORD, J.

This appeal addresses the interpretation and validity, in the context of the Commerce Clause, of *N.J.S.A.* 2A:14-22, which tolls the running of the applicable statute of limitations in actions against foreign corporations that are not "represented" in this state. Before reaching the constitutional question we must determine how a foreign corporation may be "represented" in New Jersey in order to avoid the tolling provision. We hold that a foreign corporation must obtain a certificate to do business

in this state, under *N.J.S.A.* 2A:13-4, in order to achieve "representation" in the context of *N.J.S.A.* 2A:14-22. Further, we hold that *N.J.S.A.* 2A:14-22 unconstitutionally burdens interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain a certificate to do business in order to gain the advantage of the statute of limitations.

I

Plaintiff commenced this suit in 1978 against defendant Honda Motor Co., Ltd. (Honda) and its wholly-owned American distributor, American Honda Motor Co., Inc. (American Honda). The action seeks damages for personal injuries and consequential losses occasioned by an accident on October 30, 1974, when plaintiff was thrown from a motorcycle manufactured by Honda and distributed by American Honda. At all relevant times American Honda was a California corporation that maintained facilities in New Jersey. In contrast, Honda is a Japanese corporation that has never been authorized to do business in this or any other state and carries on no activities here or elsewhere in the United States.

Because plaintiff had started suit four years after the accident, both Honda and American Honda raised as a defense the two-year statute of limitations for personal injury actions, *N.J.S.A.* 2A:14-1, and moved for summary judgment. The trial court granted American Honda's motion but denied that of Honda, ruling that the two-year statute of limitations had been tolled by *N.J.S.A.* 2A:14-22 because Honda was a foreign corporation that was not "represented" in New Jersey by a person upon whom process could be served.[1] In addition, the

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[1] *N.J.S.A.* 2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified * * * is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times

trial court held that there were sufficient bases for the exercise of *in personam* jurisdiction against Honda and that the tolling statute did not violate the equal protection clause of the federal Constitution.

The Appellate Division affirmed the judgment of the trial court. *Coons v. Honda Motor Co., Ltd., of Japan*, 176 *N.J.Super.* 575, 424 *A.*2d 446 (1980). After this Court denied cross-motions for leave to appeal, the parties sought review by the Supreme Court, which consented to hear only Honda's appeal. That Court vacated the judgment below and remanded to the Appellate Division. *Honda Motor Co., Ltd. v. Coons*, 455 *U.S.* 996, 102 *S.Ct.* 1625, 71 *L.Ed.*2d 857 (1982). Thereafter we certified the cause on our own motion. *R.* 2:12-1.

That this appeal may be set in its proper context we digress briefly from this chronological recitation to focus on the action of the Supreme Court. The purpose of that Court's remand was to afford the New Jersey court opportunity for reconsideration in light of the Supreme Court's decision in *G.D. Searle & Co. v. Cohn*, 455 *U.S.* 404, 102 *S.Ct.* 1137, 71 *L.Ed.*2d 250 (1982), a case raising precisely the same issue as is presented here. In *Searle*, the Supreme Court held that *N.J.S.A.*

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limited in said sections, *or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served,* when such cause of action accrues or at any time before the expiration of the times so limited, *the time or times during which* such person or surety is not residing within this state or *such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation (emphasis added).

2A:14-22 survived equal protection and due process challenges. The Court did not resolve the commerce clause challenge, however, stating that the issue was "clouded by an ambiguity in state law" concerning the requirement of representation under the statute.[2] *Id.* at 413, 102 *S.Ct.* at 1144, 71 *L.Ed.*2d at 259. Justice Blackmun wrote that the ambiguity was created by the following language in a footnote in this Court's opinion in *Velmohos v. Maren Eng'g Corp.*, 83 *N.J.* 282, 416 *A.*2d 372 (1980), in which we held the tolling statute constitutional in the face of equal protection and due process attacks: "We note that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 83 *N.J.* at 293 n.10, 416 *A.*2d 372. Justice Powell dissented from so much of *Searle* as discussed the Commerce Clause. He found the *Velmohos* footnote unambiguous, stating that it was "simply a neutral observation that says *nothing* as to the means of designation of an agent under New Jersey law." 455 *U.S.* at 416, 102 *S.Ct.* at 1145, 71 *L.Ed.*2d at 261 (emphasis in original).

However unfortunate our failure to articulate clearly our position in the *Velmohos* footnote, our intention was, as accurately perceived by Justice Powell, to make no more than a "neutral observation." At least that was our intention as currently recalled by three members who vote with this opinion and who also sat in the *Velmohos* case, and as *appears* to the other majority member to have been the intention of the *Velmohos* Court. That we were not entirely successful in expressing that intention is now all too painfully apparent. Although it may be "clear" to our dissenting colleagues what it was that the

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[2] The Supreme Court remanded *Searle* to the Court of Appeals for the Third Circuit to consider the possible commerce clause violation. That court remanded the matter to the District Court for the District of New Jersey, which subsequently adjourned the matter pending a binding state court interpretation of the "representation" requirement.

Velmohos footnote was meant to mean, it should suffice to point out that it was not at all clear to a majority of the Supreme Court, to say nothing of the fact that five of us who participated in *Velmohos* cannot now agree upon what it was we were saying in footnote 10. And what we said there takes on considerable significance in this case.

II

We are called upon to examine the suggested forms of representation that would permit a foreign corporation to avoid the tolling statute and avail itself of the statute of limitations. The parties discuss three procedures by which a foreign corporation can gain representation: (1) obtaining a certificate of authority to transact business in the state; (2) merely designating an agent without filing notice thereof with a government agency or official; (3) filing with the Secretary of State a notice designating a representative to accept service of process.

It is indisputable that a foreign corporation can gain the benefit of the statute of limitations by receiving a certificate of authority to do business under *N.J.S.A.* 14A:13-4.[3] The issue is whether another statutorily-authorized procedure exists that would establish representation for the limited purpose of avoiding the tolling effect of *N.J.S.A.* 2A:14-22.

Plaintiff looks to the language of *R.* 4:4-4(c)(1) as support for its contention that foreign corporations need only appoint an agent for service of process in New Jersey, rather than register to do business here. That Rule substantially tracks the language of the former stat-

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[3] A foreign corporation that procures such a certificate is then generally amenable to suit in New Jersey, *see N.J.S.A.* 14A:13-4(1)(d); is required to maintain a registered agent and office, *N.J.S.A.* 14A:4-1, and to notify the Secretary of State of any changes thereof, *N.J.S.A.* 14A:4-3; must file annual reports, *N.J.S.A.* 14A:4-5; and is subject to an annual franchise tax, *N.J.S.A.* 54:10A-2.

utes, *R.S.* 2:26-43 to -44, which were amended in 1948 to provide for service on corporations.[4] Notwithstanding these statutory amendments, when the legislature in 1949 amended the tolling statute to provide the exemption for corporations represented in the state, it chose not to incorporate the concept of "long-arm" jurisdiction that had been sanctioned by the Supreme Court in *International Shoe Co. v. Washington*, 326 *U.S.* 310, 66 *S.Ct.* 154, 90 *L.Ed.*2d 95 (1945). "Long-arm" service over corporations was not adopted until 1958, by then *R.R.* 4:4-4(d) (now *R.* 4:4-4(c)(1)). See discussion *infra* at 925. Even a cursory examination of the Rule discloses that it does not purport to serve the purpose of announcing where an identified agent can be found. It in no wise discusses the designation of an agent. An uninformed plaintiff would be faced with the virtually impossible task of locating the unknown appointee and would, in effect, lose the protection that the tolling provision is designed to afford. In addition, the Rule does not provide

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[4] Under *R.* 4:4-4(c)(1), service shall be made as follows:

> Upon a domestic or foreign corporation, by serving, in the [general] manner * * *, either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporations; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

an independent basis for the designation of an agent to accept service—it merely directs service on a person so designated.

Plaintiff argues that a mechanism that provides notice can be found in *N.J.S.A.* 14A:1-6(4), which reads in relevant part as follows: "The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office." The Secretary of State previously held the view that unless a foreign corporation has qualified to do business in the state, it would be unable to designate a registered agent for service of process.[5] Recently, however, the Secretary has acceded to the Attorney General's contrary position that in accordance with *N.J.S.A.* 2A:14-22, a foreign corporation may file with the Secretary of State a notice designating a representative in New Jersey as its agent to accept service of process.

Implicit in the Attorney General's interpretation is the notion that the tolling statute authorizes foreign corporations to designate agents without registering to do business in the state. Without such authorization foreign corporations would not be able to file notice with the Secretary under *N.J.S.A.* 14A:1-6(4) because that statute directs the Secretary to *record* documents that are filed

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[5] Counsel for Searle obtained—and filed with the Supreme Court—an opinion from the New Jersey Secretary of State determining, in effect, that the registration statute, *N.J.S.A.* 14A:14-1, was the *only* means of designating a registered agent for service of process. The opinion reads:

> In response to your recent letter, please be advised that it is the view of the Department of State that unless a foreign corporation has qualified to do business in New Jersey, they are unable to designate a registered agent for service of process.

Letter from Frank Capece, Executive Assistant to the New Jersey Secretary of State, to James H. Freis, Esq., (Oct. 22, 1981), cited in *Searle*, 455 *U.S.* at 417, 102 *S.Ct.* at 1146, 71 *L.Ed.*2d at 261.

as required or permitted by law. It does not independently authorize the *filing* of any documents. Inasmuch as there is nothing in *N.J.S.A.* 2A:14-22 or any other section or rule that authorizes the designation of an agent without registering to do business in the state, we conclude that a foreign corporation cannot file with the Secretary of State notice designating a representative as its agent to accept service of process under *N.J.S.A.* 14A:1-6(4).

Plaintiff also contends that the legislative history to the predecessor of *N.J.S.A.* 2A:14-22 supports the position that a foreign corporation need not register to do business in the state in order to designate an agent for service of process. As indicated *supra* at 924, in 1949 the tolling statute was amended and for the first time dealt specifically with a corporate defendant. The amendment excepted from the statute domestic corporations and those foreign corporations maintaining representatives in New Jersey. See *Velmohos v. Maren Eng'g Corp., supra*, 83 *N.J.* at 289, 416 *A.*2d 372. The statement accompanying the amendment reads as follows:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its law in view of recent court decisions. [Statement Accompanying Assembly No. 467 (1949) (*quoted in Velmohos*, 83 *N.J.* at 290, 416 *A.*2d 372).]

Plaintiff focuses on the language alluding to "a similar change" in New York law. That change had been interpreted to except from the tolling provision those foreign corporations that had appointed agents for service of process but had not registered to do business in New York.

Although plaintiff asserts that reference to the New York amendment evidences intent to allow a foreign corporation to appoint an agent for service of process without registering to do business in New Jersey, it is abundantly clear to us that New Jersey's statute was meant to be "similar" to New York's, not "identical." Moreover, we give great weight to the clear expression of legislative intent found in the first two sentences of the statement accompanying the amendment—the purpose was to provide foreign corporations *licensed to do business* in New Jersey the benefit of the statute of limitations—in concluding, as did Justice Powell in his separate opinion in *Searle*, that "foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business." 455 *U.S.* at 419, 102 *S.Ct.* at 1147, 71 *L.Ed.*2d at 262-63.[6]

III

Having established the means by which a foreign corporation represents itself in order to gain the benefit of the statute of limitations, we now address the Commerce Clause issue: is interstate commerce unconstitutionally burdened by the requirement that in order to avoid the effect of *N.J.S.A.* 2A:14-22, a foreign corporation must qualify to do business in New Jersey?

As Professor Tribe discusses, in most cases "[s]tate regulation affecting interstate commerce will be upheld if (a) the regulation is rationally related to a legitimate

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[6] Significantly, the dissent simply ignores the critical specific language of the statement accompanying the 1949 amendment. As the dissent correctly observes, the purpose of the amendment was to create a situation of "even footing," *post* at 933; however, that equality was to be enjoyed by domestic corporations and foreign corporations *licensed to do business* in the state, not those with, in the words of the dissent, "agents for process in New Jersey." *Id.* Because our interpretation is perfectly consistent with the unambiguous declaration of the legislature, we fail to perceive the "irony" that troubles our dissenting collegaues. *Id.*

state end, and (b) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation." L. Tribe, *American Constitutional Law* § 6-5 at 326 (1978 ed.). *See Pike v. Bruce Church*, 397 *U.S.* 137, 90 *S.Ct.* 844, 25 *L.Ed.*2d 174 (1980); *South Carolina State Highway Dept. v. Barwell Bros.*, 303 *U.S.* 177, 58 *S.Ct.* 510, 82 *L.Ed.* 734 (1938). Notwithstanding that general rule, the Supreme Court has invalidated state statutes, without balancing the competing interests, as *per se* violations of the Commerce Clause in the area of licensing requirements imposed on foreign corporations involved in interstate commerce. In a series of decisions the Supreme Court has held that a state cannot discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state. *See Allenberg Cotton Co. v. Pittman*, 419 *U.S.* 20, 95 *S.Ct.* 260, 42 *L.Ed.* 2d 195 (1974); *Dahnke-Walker Milling Co. v. Bondurant*, 257 *U.S.* 282, 42 *S.Ct.* 106, 66 *L.Ed.* 239 (1921); *Sioux Remedy Co. v. Cope*, 235 *U.S.* 197, 35 *S.Ct.* 57, 59 *L.Ed.* 193 (1914). Because the statute involved in this case similarly limits a right to those corporations that are licensed regardless of the nature of their business (interstate or intrastate), we consider it in the light of those precedents.[7]

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[7] Although not necessary to our decision, we note that *N.J.S.A.* 2A:14-22 would violate the commerce clause under a balancing analysis. The burdens attached to the requirement of obtaining certification to do business in order to avoid the tolling of the statute of limitations, see note 3 *supra*, at 924, outweigh the benefits that flow from that tolling provision, see *Searle*, 455 *U.S.* at 410, 102 *S.Ct.* at 1142, 71 *L.Ed.*2d at 257. Because of our resolution of the "representation" issue, we need not address the dissent's balancing of the benefits against the burden of appointing an agent for service of process rather than obtaining a certificate to do business. See *post* at 930.

The *Allenberg* line of cases involved statutes that conditioned the right to sue in state court on a license requirement, regardless of the nature of the business of the foreign corporation. The challengers in each case had attempted to sue in state courts to enforce contracts for the interstate sale of goods. In striking down a Kentucky statute that prevented such a suit, the *Dahnke-Walker* Court held that

> [a] corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. [257 *U.S.* at 291, 42 *S.Ct.* at 109, 66 *L.Ed.* at 244.]

The Supreme Court spoke in broad terms, declining to limit its decision to the "right to sue" context. Instead, the Court focused on the importance of leaving interstate commerce unfettered. As applied to this case that principle gives rise to the question whether the denial of the statute of limitations defense to unlicensed foreign corporations impermissibly—even though indirectly—forces those corporations to obtain a license to do business in the state.

There is no fundamental right to a statute of limitations defense. In holding the tolling provision constitutional under the less rigorous equal protection standard, the *Searle* court stated:

> [Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a rela-

> tively large degree of legislative control. [455 *U.S.* at 408, 102 *S.Ct.* at 1141, 71 *L.Ed.*2d at 256, quoting *Chase Sec. Corp. v. Donaldson*, 325 *U.S.* 304, 314, 65 *S.Ct.* 1137, 1142, 89 *L.Ed.* 1628 (1948) (brackets in original).]

That legislative control, however broad, must be subject to constitutional limits. The legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

The tolling statute, *N.J.S.A.* 2A:14-22, is a forced-licensure provision. Therefore, it must be struck down as a violation of the Commerce Clause. This decision should be given retrospective effect, consistent with the general rule applied in civil cases that a new ruling shall apply to all matters that have not reached final judgment. *See Fox v. Snow*, 6 *N.J.* 12, 14, 76 *A.*2d 877 (1950).

Reversed. The cause is remanded to the Law Division for entry of judgment for defendant Honda.

SCHREIBER and O'HERN, JJ., dissenting.

We disagree with the majority's view that the only way that a foreign corporation may appoint an agent for service of process, and thereby obtain the benefit of the statute of limitations, is to obtain a certificate of authority to transact business in the State.

We disagree as well with the Supreme Court characterization of footnote 10 of *Velmohos v. Maren Engineering Corp.*, 83 *N.J.* 282, 293 n.10, 416 *A.*2d 372 (1980), as "opaque." *See G.D. Searle & Co. v. Cohn*, 455 *U.S.*

404, 414, 102 *S.Ct.* 1137, 1144, 71 *L.Ed.*2d 250, 259 (1982). It is clear to us that a majority of the *Velmohos* Court determined that under New Jersey law all that is required of a foreign corporation to obtain the general benefits of our statute of liimtations is that it appoint an agent for service of process, not that it submit to the general jurisdiction of the forum by obtaining a certificate of authority to do business.

I.

In *Velmohos* we upheld *N.J.S.A.* 2A:14-22, which provides for the tolling of the statutes of limitations with respect to claims against foreign corporations that are "not represented in this state by any person or officer upon whom summons or other original process may be served." We held that the section did not violate the constitutional Equal Protection or Due Process Clauses when applied to a foreign corporation that is not "represented" in New Jersey, but is subject to long-arm jurisdiction by service outside the State. The United States Supreme Court affirmed this holding in *Searle*, 455 *U.S.* at 412 & n.7, 102 *S.Ct.* at 1143-44 & n.7, 71 *L.Ed.*2d at 258 & n.7, but considered it unwise to pass on the claim of a Commerce Clause violation not raised below and remanded the *Searle* case to the Circuit Court of Appeals to determine whether the Commerce Clause argument had merit. *Id.* at 412-14, 102 *S.Ct.* at 1143-44, 71 *L.Ed.*2d at 258-59. The Supreme Court also vacated and remanded *Velmohos* to this Court for further consideration in light of *Searle*. 455 *U.S.* 985, 102 *S.Ct.* 1605, 71 *L.Ed.*2d 844 (1982). The case was settled before reconsideration.

In *Velmohos* Justice Pashman carefully observed "that whatever hardship on foreign corporations might be caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." 83 *N.J.* at 293 n.10, 416 *A.*2d

372. It is remarkable that the majority opines that such representation can be authorized only by statute and not by a voluntary designation, such as by a power of attorney or by specific provision in an agreement.

Service of process upon corporations, foreign and domestic, in New Jersey is a function of court rule, not of statutes. Under the New Jersey Constitution of 1947 the Supreme Court has exclusive rule-making power over practice, procedure and administration of the courts. *Winberry v. Salisbury*, 5 *N.J.* 240, 74 *A.*2d 406, *cert.* denied, 340 *U.S.* 877, 71 *S.Ct.* 123, 95 *L.Ed.* 638 (1950). Thus, New Jersey does not have a long-arm statute. Long-arm service is available pursuant to *R.* 4:4-4(c)(1) (eff. Sept. 8, 1969) (source rule *R.R.* 4:4-4(d) (eff. Sept. 3, 1958)).

At the time the New Jersey Court Rules were first adopted, in 1948, the existing statutes governing service on corporations read:

> 2:26-43. Domestic corporations in personal actions; personal or substituted service of summons.
>
> Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy thereof to an officer, director, trustee or a managing or general agent of the corporation personally, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, *or by* delivering a copy thereof *to any person authorized by appointment* or by law *to receive service of process on behalf of the corporation*, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.

2:26-44. Foreign corporations.

Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised Statutes for service of summons upon a domestic corporation. [*L.*1948, *c.* 356 (emphasis supplied)].

The proposed draft Court Rules included a rule for service upon corporations, foreign and domestic, which closely followed the language of the now repealed statutes, *R.S.* 2:26-43 and 44 (1937).

The specific language of the rule was: d. [Service of process may be made u]pon a domestic or foreign corporation or partnership or other unincorporated association which is subject to suit under a recognized name, by serving in the manner prescribed in Paragraph a, an officer, a managing or general agent or, in the case of the corporation, a director or trustee or, in the case of a partnership, any partner; or upon the corporation, by serving personally *any person authorized by appointment* or by law to receive service of process, or any ticket or freight agent employed in any of the corporation's offices in the county in which the venue is laid; or as may be provided by law.[1] [*R.* 3:4-4(d) (Tentative Draft 1948) (emphasis supplied)].

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[1] The comment on Rule 3:4-4(d) provided:

This rule is broader than, and supplants, *R.S.* 2:26-43 (applicable at law) and 2:29-19 (applicable to suits in chancery) which are quite dissimilar in their terms. It does not supplant *R.S.* 2:26-44 applicable to foreign corporations; *R.S.* 2:26-44 and 45 dealing with service on domestic corporations by publication; *R.S.* 2:26-47 to 51 (cf. *R.S.* 14:6-2) dealing with service on secretary of state with respect to domestic and foreign corporations; *R.S.* 2:26-53 to 58.1 dealing with service as to foreign insurance companies, banks and others; *R.S.* 49:1-17 relative to the blue sky law; *R.S.* 14:13-14 relative to a defunct domestic corporation. The rule follows, somewhat,

It was modeled upon Fed.R.Civ.P. 4(d)(3). In 1948, Federal Rule 4(d)(3) authorized service within the territorial limits of the state within which the district court is held

> (3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to *any other agent authorized by appointment* or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. [Emphasis supplied].

The federal rule has been interpreted to include designations made by a party in an agreement. Thus, for example in *Emerson Radio & Phonograph Corp. v. Callander Distrib. Corp.*, 116 *F.Supp.* 926 (S.D.N.Y. 1953), service upon Prentice-Hall, Inc. as one designated in a franchise agreement "to accept in the name and on behalf of [the] distributor service of process" was held valid process under the federal rule. That court referred to the consistent practice in New York of recognizing the appointment of agents for service of process, citing *Gilbert v. Burnstine*, 255 *N.Y.* 348, 174 *N.E.* 706 (N.Y.Ct.App.1931). *Id.* at 927-28.

The majority's reliance upon the sponsor's statement to limit the effect of *N.J.S.A.* 2A:14-22 to foreign corporations which become licensed to do business in New Jersey is misplaced. It was quite natural for the spon-

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Federal Civil Rule 4(d)(3) except that it omits the last twenty-five words thereof.

The rule as adopted substantially conformed to the language of the Tentative Draft, except that the provisions for unincorporated associations and partnerships became separate rules. *See R.* 3:4-4(d), (e), (f) (eff. Sept. 15, 1948).

sor to describe the most serious problem the legislation addressed. Originally no foreign corporations, whether licensed, represented, or subject to process in New Jersey, could obtain the benefit of the running of the statute of limitations. *See Cramer v. Borden's Farm Products Co., Inc.*, 58 *F.*2d 1028 (S.D.N.Y.1932) (under New Jersey law, New York corporation licensed to do business in New Jersey is not resident of New Jersey and therefore is within scope of tolling statute). It was not until 1949 that any foreign corporations became exempt from its effects. The language of the statute is clear in extending the benefits of the running of the statute of limitations to corporations that are *represented* in the State, not corporations that are *licensed* to do business. That the sponsor highlighted its major purpose does not detract from the plain meaning of the statute, which we should follow. *See Service Armament Co. v. Hyland*, 70 *N.J.* 550, 562, 362 *A.*2d 13 (1976) (extrinsic aids to construction of statute do not alter its plain meaning).[2]

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[2] In *Cohn v. G.D. Searle & Co.*, 447 *F.Supp.* 903, 912 (D.N.J. 1978), rev'd, 628 *F.*2d 801 (3d Cir. 1980), vacated, 455 *U.S.* 404, 102 *S.Ct.* 1137, 71 *L.Ed.*2d 250 (1982), former District Judge Meanor found "[n]othing in the legislative history or court construction of *N.J.S.A.* 2A:14-22 [that] supports plaintiffs' assertion that a purpose of the statute is to penalize foreign unlicensed corporation to encourage licensure." He extended its benefits even to corporations amenable to process, a step further than we go, and one rejected by *Velmohos*. In two footnotes he cautioned against excess reliance upon the sponsor's statement.

> Mackey's introductory statement to the 1949 amendment to the New Jersey tolling statute indicated that New York had amended its tolling statute in a similar fashion in response to recent court decisions. Research has disclosed no significant cases prior to 1943 regarding persons through whom a foreign corporation might be served. However, section 1 of the 1943 amendment to C.P.A. § 19, n. 5, *supra*, was adopted specifically to alter the rule of *Maguire v. Yellow Taxicab Corp.*, 253 A.D. 249, 1 N.Y.S.2d 749, *rehearing denied*, 253 A.D. 890, 2 N.Y.S.2d 1021, *aff'd mem.* 278 N.Y. 576, 16 N.E.2d 110 (1938), which held that amenability to process through the Director of Motor

These precedents form the basis for the interpretation given the tolling statute by the *Velmohos* majority. Simply put in the circumstances of this case, the manufacturer of the motorcycles could have *appointed* its local dealer or distributor as a person authorized to receive service of process on behalf of the corporation.

The argument that such an appointment would give no public notice of the representation is especially hollow in the circumstances of this case where the motorcycle was purchased directly by the injured claimant Coons' cousin from American Honda Motor Co., Inc., a distributor for Honda Motor Company, Ltd. of Japan (Honda of Japan). It would require little effort or expense to add a line to the manufacturer's warranty advising the consumer of the appointment of the distributor to accept process with respect to product claims. In that way the foreign manufacturer would gain the benefit of the running of the statute of limitations without the burden of registering to do business in New Jersey. "The normal pattern that the manufacturer-dealer relationship follows relegates the position of the dealer to the status of a way station along the car's route from maker to consumer." *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 374, 161 *A.*2d 69 (1960). Where else would he go but to the dealer in the first place? In fact,

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Vehicles did not exempt a nonresident defendant from the tolling statute. These facts suggest that the New Jersey Legislature may well have intended that representation by a statutory agent within the state would be sufficient to satisfy the tolling statute's foreign corporation exemption. [447 *F.Supp.* 908 n. 9].

While the sponsor's statement regarding the 1949 amendment indicated that the legislature intended to give the benefit of the statute of limitations to foreign licensed corporations, the language of the amendment is not so narrowly phrased as to deny unlicensed corporations a statute of limitations defense. [447 *F.Supp.* 912 n.18].

Coons inquired whether the dealer would be authorized to accept service in this case.

The manufacturer need only designate a person whom it trusts to receive process for it. In this fashion the foreign manufacturing corporation may simply and expeditiously gain the advantage of having the statute of limitations run from the date the cause of action arises, for claims of plaintiffs who can reasonably be expected to have knowledge of that designation.

II.

We also disagree with the majority insofar as it rules that the Secretary of State even now lacks power to receive and file a foreign corporation's designation of an agent to receive process for the purpose of compliance with *N.J.S.A.* 2A:14-22.

The Attorney General has advised the Secretary of State that he has the power to accept such a designation and relies upon *N.J.S.A.* 14A:1-6(4), which provides that:

> The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office. . . .

The Attorney General's position is that since *N.J.S.A.* 2A:14-22 presumes the designation by a foreign corporation of a representative for service of process (as we have seen, such designations may be accomplished by letters or powers of attorney), that statute constitutes authority for the Secretary of State to record such designations as documents that are "permitted by law" to be filed. Unquestionably, the designation of an agent for service of process by a foreign corporation "relate[s] to . . . [and] affect[s] [the] corporation[]." *N.J.S.A.* 14A:1-6(4). It is certainly within the spirit of the type of documents the Secretary of State receives from for-

eign corporations and the Attorney General opines that the Secretary of State should accept the documents. We perceive no reasons to reject his opinion. The filing of such a document would require a fee of $15, pursuant to *N.J.S.A.* 14A:15-3(15). The filing of that document would constitute a public record available to any person for inspection and duplication in accordance with *N.J.S.A.* 14A:1-9, which states that:

> (1) Upon request of any person, the Secretary of State shall furnish certified copies of documents filed in his office in accordance with the provisions of this act.
>
> (2) Upon request of any person, the Secretary of State shall certify to the existence or non-existence of any facts on record in his office relating to domestic or foreign corporations.

Therefore, in the Attorney General's view, the applicable statutory framework provides a clear mechanism by which the record of a designated agent by a foreign corporation can and will be reflected by the New Jersey Secretary of State. We agree that that position can be maintained under New Jersey law.

Although the customary meanings of the two phrases are similar, the majority makes a distinction between "record[ing]" and "filing," *ante* at 925.[3] We believe that it is too narrow an interpretation of the powers of the Secretary of State, a constitutional officer. Indeed, the Attorney General's interpretation of the duty of the Sec-

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[3] File . . . vb . . . to deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office.

Record . . . vb . . . to make or have made an authentic official copy of (as a deed, mortgage, lease) and deposit or have deposited esp. as in an office designated by law. [Webster's International Dictionary 849, 1898 (3 ed. 1976)].

retary of State to receive and file this one-page document under *N.J.S.A.* 14:1-6(4) is consonant with the concept that statutes should be interpreted so as to be in harmony with constitutional requirements. *See Right to Choose v. Byrne*, 91 *N.J.* 287, 450 *A.*2d 925 (1982) (excision of offending provision prohibiting reimbursement for therapeutic abortions justified to maintain balance of Medicaid program); *Jordan v. Horsemen's Benev. & Protect. Ass'n*, 90 *N.J.* 422, 448 *A.*2d 462 (1982) (allocation and reporting requirements imposed to uphold legislative program to distribute portions of purses to horsemen); *New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57, 411 *A.*2d 168 (1980) (judicial surgery performed upon legislation to implant threshold reporting requirements to uphold campaign reporting act).

All we need do to sustain the legislation is to emphasize that it is beyond legislative power to require of foreign corporations the full panoply of registration to be covered by our statute of limitations and that provisions of the legislation inconsistent therewith would yield to the general legislative purpose. *See New Jersey State Parole Bd. v. Byrne*, 93 *N.J.* 192, 460 *A.*2d 103 (1983); *United States Chamber of Commerce v. State*, 89 *N.J.* 131, 445 *A.*2d 353 (1982); *State v. Zito*, 54 *N.J.* 206, 254 *A.*2d 769 (1969).[4] We agree that it would be unfair to apply

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[4] In this way the designation of an agent for service of process would not be converted into a submission to the general jurisdiction of our courts. It would only facilitate service over otherwise amenable defendants. In this case Honda of Japan has preserved its jurisdictional defense under *World-Wide Volkswagen Corp. v. Woodson*, 444 *U.S.* 286, 100 *S.Ct.* 559, 62 *L.Ed.*2d 490 (1980). There is a conundrum in the argument that the foreign corporation must surrender its jurisdictional defense by registering to gain the benefit of the statute because, by definition, if it is beyond the jurisdiction of the State under *World-Wide Volkswagen*, it cannot be sued at all and the statute of limitations issue is irrelevant. The life of the law is not always logic.

this ruling to the parties in view of the position previously taken by the Secretary of State in *Searle*. *Ante* at 924 n. 5. However, we see no reason why the Secretary cannot accept such designations in the future. Such a reading would preserve the constitutionality of the statute.

III.

Because of our conclusion, we find the legislative scheme does not violate the Commerce Clause.

> When, as here, Congress has not preempted the field, states may enact legislation that touches upon interstate commerce. *See generally K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Comm'n*, 75 *N.J.* 272, 294-300 [381 *A.*2d 774] (1977). When a state acts to prohibit out-of-state competition, a virtually *per se* rule of invalidity has been applied. *Philadelphia v. New Jersey*, 437 *U.S.* 617, 624, 98 *S.Ct.* 2531, 2535, 57 *L.Ed.*2d 475, 481 (1978). *See also Baldwin v. G.A.F. Seelig, Inc.*, 294 *U.S.* 511, 527, 55 *S.Ct.* 497, 502, 79 *L.Ed.* 1032, 1040-41 (1935). But when the legislation promotes the health, welfare and safety of its inhabitants, the analysis then requires that a determination be made as to whether the effect of the statute on interstate commerce is only incidental. If the burden is clearly excessive in relation to the local interest, the statute will be declared invalid. The extent to which a burden on interstate commerce will be tolerated depends on the nature of the local interest and on whether that local interest could be promoted in an alternative fashion without such a burden. *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137, 142, 90 *S.Ct.* 844, 847, 25 *L.Ed.*2d 174, 178 (1970). [*United States Chamber of Commerce v. State*, 89 *N.J.* at 160-61, 445 *A.*2d 353].

It is clear here that we are not dealing with a case of direct discrimination against foreign commerce. Had

that been so, the United States Supreme Court would have invalidated the legislation on the first go-round. Even Justice Stevens in dissent in *Searle* concluded that "there is a rational basis for treating unregistered foreign corporations differently from registered corporations because they are somewhat more difficult to locate and to serve with process." 455 *U.S.* at 420, 102 *S.Ct.* at 1147, 71 *L.Ed.*2d at 263. The legislation has a sound and beneficial state purpose. That purpose is clear, not to favor local businesses, but to guard the citizens against loss of their rights due to the conduct of absent enterprises.

Analysis of commerce clause challenges to state regulations that are not protectionist have generally yielded broadest authority to the states.

> In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulation of commerce, . . . never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." [*Huron Portland Cement Co. v. Detroit*, 362 *U.S.* 440, 443-44, 80 *S.Ct.* 813, 815-16, 4 *L.Ed.*2d 852, 856 (1960) (quoting *Sherlock v. Alling*, 93 *U.S.* 99, 103, 23 *L.Ed.* 819, 820 (1876))].

See also Raymond Motor Transportation, Inc. v. Rice, 434 *U.S.* 429, 98 *S.Ct.* 787, 54 *L.Ed.*2d 664 (1978); *Southern Pacific Co. v. Arizona*, 325 *U.S.* 761, 65 *S.Ct.* 1515, 89 *L.Ed.* 1915 (1945). The Commerce Clause is, after all, a grant of authority to Congress, not to the courts. *Cf. Northwest Airlines, Inc. v. Minnesota*, 322 *U.S.* 292, 302, 64 *S.Ct.* 950, 955, 88 *L.Ed.* 1283, 1290 (1944) (Black, J., concurring) ("The Constitution gives [Congress] the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution").

We should decide a constitutional burden on the basis of the case before us. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 *U.S.* 489, 495 & n.7, 102 *S.Ct.* 1186, 1191 & n.7, 71 *L.Ed.2d* 362, 369 & n.7 (1982); *In re Martin*, 90 *N.J.* 295, 309-10, 447 *A.*2d 1290 (1982); *Shelton College v. State Bd. of Educ.*, 48 *N.J.* 501, 521-23, 226 *A.*2d 612 (1967). To suggest it is a disproportionate burden for a worldwide enterprise to adapt to the statute of limitations law of the State of New Jersey and to designate an agent for service of process is simply not persuasive. According to the Standard Directory of Advertisers (1982), Honda spent $21,500,000 on advertising in this country. Moody's International reports that Honda of Japan's sales in 1982 were $7,945,400,000.[5] The message they send to the New Jersey consumer is clear and forceful. The Legislature has asked manufacturers to send one little brief message about where they can be found in case anything goes wrong with the motorcycle.

The irony here is that the purpose of the Legislature, in enacting the 1949 amendments to the statute of limitations, was to put foreign corporations on an even footing with individuals. Thus a foreign corporation, which was then considered domiciled elsewhere, could gain the advantage of the New Jersey statute of limitations if it had agents for process in New Jersey. In that respect, it would be no different from an individual, partnership or unincorporated association doing business. The anomaly of the Court's decision is that a corporation now has

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[5] The Appellate Division granted leave to Brinco Mining Limited to participate in the proceedings as an *amicus curiae*. It was a bit like inviting the fox into the hen house. Papers on file with us refer to pending litigation in the United States Court for the District of New Jersey where its amenability to process was at issue. Like Honda, it has a direct interest in the case's outcome and the wherewithal to comply with our tolling statute. Brinco Mining is a worldwide resource development company with 1980 income of $18,000,000. In 1980 it acquired Cassiar Resources Ltd., a Canadian processor of asbestos.

an advantage over an individual. The long-standing judicial construction of this statute is that even though an absent individual defendant is subject to substituted service in New Jersey, the statute still tolls. *Lemke v. Bailey*, 41 *N.J.* 295, 196 *A.*2d 523 (1963) (service in a motor vehicle case upon the Director of Motor Vehicles); *cf. Guas v. Guas*, 146 *N.J.Super.* 541, 370 *A.*2d 91 (Law Div. 1977) (jurisdiction based on residence at time of accident; move to another state tolled statute). The equation of amenability with presence has never been followed by our courts.

The legislative judgment is one with which we may or may not agree. The point is that our courts have agreed with it for a long time and the Legislature has never changed it. *Lemke*, 41 *N.J.* 295, 196 *A.*2d 523; *Lackovic v. New England Paper Tube Co., Inc.*, 127 *N.J.Super.* 394, 317 *A.*2d 426 (Law Div. 1974) (corporate defendant); *Whalen v. Young*, 28 *N.J.Super.* 543, 101 *A.*2d 64 (Law Div. 1953), rev'd on other grounds, 15 *N.J.* 321, 104 *A.*2d 678 (1954) (corporate defendant); *Gotheiner v. Lenihan*, 29 *N.J.Misc.* 119, 25 *A.*2d 430 (Sup. Ct. 1942); *Blackmon v. Govern*, 138 *F.Supp.* 884 (*D.N.J.* 1956). The only contrary holding, *Ferraro v. Ferro Trucking Co.*, 72 *N.J.Super.* 519, 179 *A.*2d 74 (Law Div. 1962), has been discredited. *See Lackovic*, 127 *N.J.Super.* at 397-98, 317 *A.*2d 426; *Hopkins v. Kelsey-Hayes, Inc.*, 463 *F.Supp.* 539, 541 (D.N.J. 1978), aff'd, 628 *F.*2d 801 (3d Cir. 1980), vacated, 455 *U.S.* 985, 102 *S.Ct.* 1605, 71 *L.Ed.*2d 844 (1982).

The essence of what the majority is doing is to repeal the tolling provision with respect to nonresident corporations since, as Judge Brotman pointed out in *Hopkins*, "the vast majority who commit torts within the state would be amenable to long-arm service. Without more authority, we cannot construe a state statute in a manner rendering it ineffective." 463 *F.Supp.* at 542. We would not do so either.

We understand the logic of the argument that was advanced by Justice Sullivan for the dissenting members

of the Court in *Velmohos*, 83 *N.J.* at 297-99, 416 *A.*2d 372, that we should take into account the jurisdictional change of long-arm service of process that has extended "to the uttermost limits permitted by the United States Constitution," *Avdel Corp. v. Mecure*, 58 *N.J.* 264, 268, 277 *A.*2d 207 (1971), and interpret the tolling statute in accordance with that change. We respect that argument but it was rejected in *Velmohos*. We either stand behind that judgment or we do not.

Taken in this framework, we cannot entertain that belief of unconstitutionality beyond a reasonable doubt necessary to invalidate this legislative program. *Harvey v. Essex County Bd. of Freeholders*, 30 *N.J.* 381, 388, 153 *A.*2d 10 (1959); *New Jersey Sports & Exposition Auth. v. McCrane*, 119 *N.J.Super.* 457, 292 *A.*2d 580 (Law Div. 1971), modified and aff'd, 61 *N.J.* 1, 292 *A.*2d 545, appeal dismissed *sub nom. East Rutherford v. New Jersey Sports & Exposition Auth.*, 409 *U.S.* 943, 93 *S.Ct.* 270, 34 *L.Ed.*2d 215 (1972). For when we base our decision upon the Constitution we leave no room for legislative cure.

IV.

Honda of Japan manufactured the motorcycle purchased by the plaintiff through Honda's local distributor. Honda of Japan could easily and at minimal cost have designated its local dealer to accept service of process. If it had done so, it would have been "represented" in this State and the statute of limitations would not have been tolled under *N.J.S.A.* 2A:14-22. Honda of Japan chose to do otherwise and therefore the statute of limitations has been tolled.

Moreover, we would permit every foreign corporation to file a designation or appointment for service of process within this State with the Secretary of State. We conclude, therefore, that *N.J.S.A.* 2A:14-22 does not violate the Commerce Clause.

We would affirm the judgment.

Chief Justice WILENTZ joins in this opinion.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

WALTER P. COONS,
Plaintiff-Respondent,

v.

HONDA MOTOR COMPANY, LTD. OF JAPAN, a corporation,
Defendant-Appellant.

Argued December 9, 1980—Decided December 29, 1980

Before Judges FRITZ, POLOW and JOELSON.

John I. Lisowski argued the cause for appellant (*Morgan, Melhuish, Monaghan & Spielvogel,* attorneys).

Robert H. Jaffe argued the cause for respondent (*Robert H. Jaffe* and *Howard G. Schlesinger* on the brief).

The opinion of the court was delivered by

POLOW, J. A. D.

On October 30, 1974, plaintiff suffered serious injuries when thrown from his 1972 Honda CB350 motorcycle. In his complaint, filed October 30, 1978, he demanded damages from the designer-manufacturer, Honda Motor Co., Ltd. of Japan (Honda Ltd.) and its distributor, American Honda Motor Co., Inc. (American Honda) alleging that he suffered severe burns when the defectively

designed gas cap opened during the accident and a fire ensued. American Honda, a wholly owned subsidiary of Honda Ltd., is authorized to do business in New Jersey and was promptly served. A year later, the court authorized service of process on Honda Ltd. through service on a Washington D.C. law firm acting as its agent, it was effected accordingly and Honda Ltd. became a defendant.

Summary judgment was granted in favor of American Honda based on its contention that plaintiff's suit was barred by the statute of limitations. In a separate opinion filed this day, we have affirmed that judgment against plaintiff. Here we deal with the appeal of defendant Honda Ltd. which contends that the court lacked in personam jurisdiction over it and that, in any event, it, too, should be afforded the protection of the statute of limitations, *N.J.S.A.* 2A:14-2.

In December 1977, American Honda notified the National Highway Traffic Safety Administration of its intention to recall certain motorcycle models because a defect had been discovered in the fuel filler cap release mechanism. Notices of the defect were forwarded to owners of the recalled motorcycles, including the 1972 Honda CB350, in December 1977, but plaintiff claims he was unaware of the recall notice until July 1978 when so advised by his neighbor. Hence, he contacted counsel and suit was instituted on October 30, 1978. Appellant does not question the propriety of plaintiff's certification that after diligent inquiry and effort, personal service could not be made on any servant of Honda, Ltd., within this state, and that since the corporation is a foreign corporation with no place of business in this state, as far as service of process is concerned, it may be made by registered or certified mail return receipt requested to a registered agent. *R.* 4:4-4(c)(1). However, appellant attacks the ruling in favor of in personam jurisdiction, asserting lack of minimum contacts. Additionally, assuming *ar-*

guendo that there is jurisdiction, it seeks protection of the statute of limitations.

Historically, jurisdiction was based upon a court's de facto authority over the person of the individual. *Pennoyer v. Neff*, 95 *U.S.* 714, 24 *L.Ed.* 565 (1878). Accordingly, the physical presence of a defendant within the jurisdiction was critical to a binding judgment. However, in *Int'l Shoe Co. v. Washington*, 326 *U.S.* 310, 66 *S.Ct.* 154, 90 *L.Ed.* 95 (1945), the Supreme Court extended the concept of due process to include in personam jurisdiction over a defendant not present within the territory of the forum provided he has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play.'" *Id.* at 316, 66 *S.Ct.* at 158. *See Milliken v. Meyer*, 311 *U.S.* 457, 463, 61 *S.Ct.* 339, 342, 85 *L.Ed.* 278 (1940).

Nevertheless, the "minimum contacts" requirement, in order to satisfy due process, requires that the defendant have some contacts, ties, or relations with the forum state for in personam jurisdiction or that "a corporation exercis[e] the privilege of conducting activities within a state" thus enjoying the benefits and protection of its laws. *Int'l Shoe Co. v. Washington, supra*, 326 *U.S.* at 319, 66 *S.Ct.* at 160. Since 1945 there has been a discernible trend in the direction of expanding in personam jurisdiction to the extent that, in 1974, a New Jersey Federal District Judge wrote that

> when a manufacturer deliberately seeks to profit from marketing its products in a state, he is doing business within that state as to each transaction, whether he does so by an agent, indirectly by mail or even more indirectly through a third party, who may have an exclusive distributorship. In such case there is nothing unfair, unjust or violative of due process standards in imposing '*in personam*' jurisdiction over such a manufacturer in an action predicated upon that transaction.

> Indeed, under such circumstances it would be fundamentally unfair for those who purchased products in New Jersey, relying on the protection of New Jersey's laws and courts to assure that New Jersey's standards of fitness and warranties would be maintained, to be denied adjudication of their claims, and forced to travel throughout this nation, perhaps the world, seeking a forum in which the manufacturer of these goods was actually present. [*Gelineau v. New York Univ. Hosp.*, 375 *F.Supp.* 661, 667 (D.N.J. 1974)]

Two years after that decision, a Federal District court in Nebraska under circumstances similar to those here present, involving this very appellant corporation, denied its motion to dismiss for lack of in personam jurisdiction. *Hetrick v. American Honda Motor Co., Inc.*, 429 *F.Supp.* 116 (D.Neb. 1976). There, addressing the due process issue, the court said: "Where a foreign defendant has reason to know that its products, traveling through interstate commerce will reach an ultimate consumer in any state of the United States, due process is satisfied." *Id.* at 118. Furthermore, it was reasoned that "it would be fundamentally unfair to allow a foreign manufacturer to insulate himself from the jurisdiction of the courts by use of an exclusive distributor." *Id.* at 118-119.

Our state courts have been active in interpreting and applying the minimum contacts test requiring that "the quality and nature of the contacts [be] such that maintenance of the suit does not offend 'traditional notions of fair play and justice.'" *Feldman v. Bates Manufacturing Co.*, 143 *N.J.Super.* 84, 89 (App. Div. 1976). *See Trustees of Structural and Ornamental Iron Workers Fund v. Huber*, 136 *N.J.Super.* 501, 505 (App. Div. 1975) certif. den. 70 *N.J.* 143 (1976). The necessary minimum contact may be found in the relationship between a foreign manufacturer and its New Jersey distributor.

Certisimo v. Heidelberg, 122 *N.J.Super.* 1 (Law Div. 1972), aff'd sub nom. *Van Eeuwen v. Heidelberg Easter, Inc.*, 24 *N.J.Super.* 251 (App. Div. 1973). Maintenance of such a suit does not offend the concepts of fair play and substantial justice. This is particularly true where as seems apparent here, the manufacturer-distributor relationship is an active one and explicitly designed to provide and ensure the sale of the foreign corporation's products. Obviously, the foreign corporation enjoyed substantial revenue from sales within this state.

The most recent application of the minimum contacts standard by the United States Supreme Court, while rejecting long-arm jurisdiction, provided dictum entirely applicable here. In *World-Wide Volkswagen Corp. v. Woodson*, 444 *U.S.* 286, 100 *S.Ct.* 559, 62 *L.Ed.*2d 490 (1980), Mr. Justice White stated:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. [*Id.* at 297, 100 *S.Ct.* at 567]

In the situation *sub judice*, an affidavit of an assistant vice-president of American Honda reveals that appellant manufactures products in Japan and that sales are consummated in that country in accordance with American Honda's orders. All deliveries are made by appellant to American Honda f. o. b. Japan. Nevertheless, American Honda is a wholly owned subsidiary of appellant Honda, Ltd. We are convinced that a foreign manufacturer may not successfully insulate itself completely from suit in this country by such an arrangement where its product is negligently manufactured abroad and delivered for sale here and then avoid re-

sponsibility by use of its exclusive agent or distributor. *See Gelineau v. New York Univ. Hosp., supra,* 375 *F. Supp.* at 667; *Van Eeuwen v. Heidelberg, supra.*

We conclude that appellant's reliance on *World-Wide Volkswagen* is unavailing. Not only is it distinguishable factually in that there the corporation's products were not sold in the forum state but, in addition thereto, the dictum therein is logical and persuasive. Hence, we affirm the ruling of the trial judge denying appellant's motion to dismiss the complaint for lack of in personam jurisdiction.

Appellant's next argument has some surface appeal. Honda Ltd. reasons that if in personam jurisdiction may be acquired simply by serving its legal agents in Washington D.C., then it is amenable to process and there is no reason to deny operation of the bar of the statute of limitations, *N.J.S.A.* 2A:14-2. Furthermore it suggests that failure to apply that bar in this case and the statutory justification for tolling the statute under these circumstances, *N.J.S.A.* 2A:14-22, violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. Presumably, to support that argument, appellant could show that the very same legal agent ultimately served with process in 1979 was equally available in 1976, before the two year period of limitations had expired.

Any lingering concern about the propriety and constitutionality of the statutory provision which tolls the statute of limitations with respect to claims against a foreign corporation not represented in this state by anyone upon whom service of process can be made, *N.J.S.A.* 2A:14-22, has been dissipated by recent decisions of the New Jersey Supreme Court and the Third Circuit Court of Appeals, *Velmohos v. Maren Engineering Corp.*, 83 *N.J.* 282 (1980) and *Hopkins v. Kelsey-Hayes, Inc.*, 628 *F.*2d 801 (3d Cir. 1980).

Velmohos involved a suit against two corporations of the State of Illinois, the designer and manufacturer of an allegedly defective shredder-baler. Since neither defendant maintained a registered office in this state or had agents for service of process located in New Jersey, the provisions of *N.J.S.A.* 2A:14-22 were held to have tolled the statute of limitations although long-arm service could have been made outside of this state within the two year period.

Justice Pashman reasoned that the statutory language "not represented in the state by any person or officer upon whom summons or other original process may be served" is not interchangeable with "not amenable to service." *Velmohos v. Maren Engineering Corp., supra,* 83 *N.J.* at 288. Therefore, "unrepresented, foreign corporations subject to long-arm service are not exempt from *N.J.S.A.* 2A:14-22. *Ibid.*

The *Velmohos* court noted that *N.J.S.A.* 2A:14-22 (originally *R.S.* 2:24-7) was amended in 1949 for the express purpose of exempting "from the statute domestic corporations and those foreign corporations maintaining representatives in New Jersey." *Id.* at 289. Prior to 1949, the tolling provision did not deal with the foreign corporate defendant at all. *Ibid.* As the statement accompanying the 1949 Assembly Bill indicated: " 'Foreign corporations *licensed to do business in New Jersey* are not deprived by judicial construction of the benefit of the statute of limitations. The purpose of this bill is to correct that situation.' " *Id.* at 290 (emphasis added). Obviously, amenability to service is not the appropriate test. Since the legislature "acted to remove only represented corporations from the tolling provisions of *N.J.S.A.* 2A:14-22," absent express language "incorporating amenability to long-arm service as an exemption from the tolling statute, that class of foreign corporations remains subject to its effect." *Id.* at 292-293 (footnote omitted). "[W]hatever hardship on foreign corporations might be

caused by continued exposure to suit can be easily eliminated by the designation of an agent for service of process within the State." *Id.* at 293 n. 10; *Lemke v. Bailey*, 41 *N.J.* 295 (1963); *Govan v. Trade Bank and Trust Co.*, 109 *N.J.Super.* 271 (App. Div. 1970).

Appellant also projects the argument that "there are Honda dealers readily found in the yellow pages of any telephone directory," thus suggesting that Honda's high visibility warrants the conclusion that service could properly be effected in this state. The argument lacks force. *R.* 4:4-4(c)(1) deals only with "amenability" to service of process. *N.J.S.A.* 2A:14-22 tolls the statute of limitations with regard to foreign unregistered corporations "not represented in this state by a person or officer" for service of process. Without regard for the unlikely proposition that Honda dealers are agents of Honda Ltd., the tolling provision of the statute refers to individuals who "represent" rather than those who perform details or who may be "minor functionaries" of the foreign corporation. *Hopkins v. Kelsey-Hayes, Inc., supra*, 628 *F.*2d at 808. "[T]he statutory tolling provision contemplates a much more significant corporate figure or presence—one capable of 'representing' the corporation—than does the service rule." *Ibid.*

Velmohos and *Hopkins* leave no room for doubt that the statute of limitations does not bar plaintiff's action against Honda Ltd. Rather, the tolling provision, *N.J.S.A.* 2A:14-22, preserves plaintiff's claim under the circumstances, there being no representative of appellant in this state. Hence, we affirm the determination of the trial judge in that regard.

Defendant's constitutional argument that *N.J.S.A.* 2A:14-22 violates the equal protection clause has been put to rest by the Supreme Court in *Lemke v. Bailey, supra*, 41 *N.J.* at 303 and, much more recently, in *Velmohos*, as demonstrated by the following comment:

> The flaw in defendants' argument is that it recognizes as rational only a distinction based on the impossibility of obtaining jurisdiction over a foreign corporation. It refuses to acknowledge that among amenable foreign corporations there are degrees of difficulty in effecting service. A recognition of these degrees of difficulty supplies a present rational basis for distinguishing between represented corporations and those unrepresented but amenable to long-arm service. [83 *N.J.* at 295].

The *Hopkins* court also addressed the equal protection argument in the following paragraph:

> Since long-arm service is more difficult to achieve than service within the state, it is not irrational for New Jersey to distinguish between two classes of foreign corporations. Those foreign corporations which are represented in New Jersey, and are thus more readily available to plaintiffs, are afforded limitations protections. On the other hand, the limitations statutes are tolled against foreign corporations which are not represented in New Jersey and thus are not as available to New Jersey plaintiffs. This distinction between represented and non-represented foreign corporations reflects the pragmatic difficulties which may be encountered by plaintiffs suing foreign corporations. Since service of process under the long-arm statute is more difficult and time-consuming to achieve than service within the state, and since out-of-state non-represented corporate defendants may be difficult to locate let alone serve, tolling the statute of limitations protects New Jersey plaintiffs and facilitates their lawsuits against such defendants. Because the tolling provision fulfills the legitimate state purpose of easing the special burdens of suits against non-represented foreign corporations, we cannot say that the distinction which it

recognizes is irrational. [628 *F.*2d at 810-811 (footnote omitted)].

Accordingly, the order of the trial court denying the motion of Honda Motor Co., Ltd. of Japan for summary judgment, is affirmed and the matter is remanded for trial.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-3229-79

WALTER COONS,
Plaintiff-Appellant,

v.

AMERICAN HONDA MOTOR CO., INC., *et al.*,
Defendant-Respondent.

Argued December 9, 1980—Decided December 29, 1980

Before Judges Fritz, Polow and Joelson.

On appeal from the Superior Court of New Jersey
Law Division, Middlesex County

Robert H. Jaffe argued the cause for appellant (Robert H. Jaffe and Howard G. Schlesinger on the brief).

John I. Lisowski argued the cause for respondent (Morgan, Melhuish, Monaghan & Spielvogel, John I. Lisowski, of counsel and on the brief).

PER CURIAM

Plaintiff suffered severe burns when, while driving his Honda CB350 motorcycle, an accident occurred forcing his body over the gas tank toward the handlebars. As a result, the gas cap mechanism was triggered, the cap

opened permitting gasoline to flow from the tank, it ignited and the burns ensued.

The accident took place on October 30, 1974. On October 30, 1978, plaintiff filed a complaint seeking damages from the distributor American Honda Motor Co., Inc. (American Honda), a corporation authorized to do business in New Jersey, and the designer-manufacturer Honda Motor Co., Ltd. of Japan which has no corporate presence in this state. Summary judgment was granted in favor of American Honda upon a determination that plaintiff's action was barred by the statute of limitations since the action had not been commenced within two years after the cause of action accrued, *N.J.S.A.* 2A:14-2, and we deal, in this opinion, with plaintiff's appeal therefrom.

More than a year after the complaint was filed, plaintiff effected long-arm service on Honda, Ltd., a Japanese corporation, by serving its legal agent in Washington, D.C. The trial judge ruled that *in personam* jurisdiction over the foreign manufacturer was thus obtained and that as against Honda, Ltd., the action was not barred by the statute of limitations. On separate applications, we granted plaintiff leave to appeal from the summary judgment awarded in favor of American Honda and we granted Honda, Ltd., leave to appeal from denial of its summary judgment motion. We are simultaneously herewith filing a separate opinion affirming the latter determination against Honda, Ltd., in the companion appeal. Hence, plaintiff's claim against the Japanese corporation will proceed to trial irrespective of our conclusion in this appeal that the claim against American Honda, the distributor in New Jersey, is barred by the statute of limitations as determined by the trial judge.

At the *Lopez* hearing, (*Lopez v. Swyer*, 62 *N.J.* 267 (1973)), plaintiff acknowledged that he knew that his body had been forced "over the tank up toward the handlebars," that the fuel cap had opened and that gaso-

line had poured from it. Having operated the vehicle for six or seven months, he also knew that the hinged gas cap was designed to open upon depressing a button. The defect, as described by defendants in their report to the National Highway Traffic Administration in December 1977, was such that during a collision the "rider may impact the hinged fuel filler cap in such a manner as to actuate the release lever resulting in opening of the cap" and "[i]f the cap opens, gasoline will escape and cause a fire hazard."

Following the *Lopez* hearing, the trial judge ruled that plaintiff had knowledge immediately upon the happening of the accident of "the facts upon which a basis for an actionable claim can be grounded." Hence, the two year limitation for institution of this action began to run on October 30, 1974, the date of the accident, more than four years before suit was instituted.

The Supreme Court of New Jersey has articulated the rationale of the discovery rule in the following manner:

> We find the trial judge to have been in error in concluding that regardless of when a claimant knows or reasonably should know the *facts* of the relationship of his injury to a particular source or cause, the applicable limitations period does not begin running until he learns from a lawyer that those facts equate with a legal cause of action against the producer or originator of the injurious source or cause. It was not our intent [in *Lopez v. Swyer, supra*] to hold that a claimant's time to sue, for limitations purposes, does not begin to run until he knows or is advised by a lawyer that facts of which he does, or should, reasonably have knowledge, give rise to a legal cause of action against a particular defendant. The statute of limitations necessarily imputes conclusively to a claimant knowledge that the law affords or may afford a cause of action on the basis of those facts of injury and causal relationship which

> in law do evoke a cause of action. In this regard it is of no consequence whether the cause of action arises in the field of products liability or any other aspect of tort law, or as to the degree of expertise which different lawyers possess in one such field or another. The discovery principle modifies the conventional limitations rule only to the extent of postponing the commencement of accrual of the cause of action until plaintiff learns, or reasonably should learn, the existence of that *state of facts* which may equate in law with a cause of action. There is no suggestion in any of the leading cases in this area that accrual of the cause of action is postponed until plaintiff learns or should learn the state of the law positing a right of recovery upon the facts already known to or reasonably knowable by the plaintiff. [*Burd v. N.J. Tel. Co.*, 76 *N.J.* 284, 291-292 (1978)].

Plaintiff had owned his motorcycle six or seven months before the accident and knew that the gas cap opened when the button was depressed. That knowledge and his awareness that his body had been "forced over the tank up toward the handlebars", that after the accident the gas cap was "slightly ajar" and that gasoline poured out of the tank justifies the conclusion that all relevant facts which may equate with a legal cause of action were known to him in October 1974 thus triggering the operation of the statute of limitations. In view of plaintiff's knowledge at the time of the incident itself, the date of defendant's notice of recall and report of the defect is irrevelant. *Burd v. N.J. Tel. Co., supra*; *Lopez v. Swyer, supra*; *Silverman v. Lathrop*, 168 *N.J. Super.* 333 (App. Div. 1979).

For the reasons stated, the summary judgment in favor of defendant American Honda Motor Co., Inc., is affirmed.

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-9016-78

Civil Action

WALTER P. COONS,

Plaintiff,

vs.

HONDA MOTOR CO., LTD. OF JAPAN, *et al.*,

Defendants.

ORDER STRIKING HONDA LTD's
FIFTH AND SIXTH AFFIRMATIVE DEFENSES

This matter having been opened to the Court by Robert H. Jaffe, P.A., attorneys for the plaintiff, Walter P. Coons, for an order striking the defendant's fifth and sixth affirmative defenses, Robert H. Jaffe, Esq., appearing and John I. Lisowski, Esq. appearing in opposition thereto and in support of motions to dismiss or, alternatively, for summary judgment; and for good cause shown;

It is on this 25th day of February, 1980;

ORDERED THAT there be striken from the answer of the defendant Honda Motor Co. Ltd. of Japan its fifth affirmative defense of lack of jurisdiction;

IT IS FURTHER ORDERED THAT there be striken from the answer of the defendant its sixth affirmative defense concerning the statute of limitation;

AND IT IS FURTHER ORDERED THAT the motions of defendant Honda Motor Co., Ltd. of Japan to dismiss the complaint or, alternatively, for summary judgment are denied.

/s/ Herman L. Breitkopf
HERMAN L. BREITKOPF, J.S.C.

APPENDIX F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-9016-78

Civil Action

WALTER P. COONS,

Plaintiff,

vs.

AMERICAN HONDA MOTOR CO., INC., *et al.*,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT
IN FAVOR OF THE DEFENDANT,
AMERICAN HONDA MOTOR CO., INC.

This matter having been brought before the Court on Motion of the attorneys for the defendant, American Honda Motor Co., Inc., John I. Lisowski, Esq., appearing and Robert H. Jaffe, Esq. appearing for plaintiff in opposition thereto for an Order granting Summary Judgment on behalf of the American Honda Motor Co., Inc., and the Court having taken testimony and having heard the argument of counsel, and for good cause shown;

It is on this 26th day of December, 1979;

ORDERED, that Summary Judgment based on the Statute of Limitations be and the same is hereby granted as to American Honda Motor Co., Inc., and it is further

ORDERED, that plaintiff's motion to strike the defense of the Statute of Limitations be and the same is hereby denied, and it is further

ORDERED, that a copy of the within Order be forwarded to all counsel with 7 days of the date hereof.

/s/ Herman L. Breitkopf
HERMAN L. BREITKOPF, J.S.C.

APPENDIX G

SUPREME COURT OF NEW JERSEY

September Term 1982

20,338

WALTER P. COONS,
Plaintiff-Respondent,

vs.

AMERICAN HONDA MOTOR CO., INC.,
Defendant-Appellant.

[Filed Sep. 17, 1982]

ACTION ON CERTIFICATION ORDER

Pursuant to Rule 2:12-1 it is ORDERED that the appeal from the judgment entered in this cause February 25, 1980, in the Superior Court, Law Division now pending in the Superior Court, Appellate Division A-2857-79, be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers necessary to be filed in this cause by the parties hereto in the prosecution of this appeal shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 14th day of September, 1982.

/s/ Stephen W. Townsend
Clerk

APPENDIX H

IN THE SUPREME COURT OF NEW JERSEY

Docket No. A-87

WALTER P. COONS,

Petitioner,

—vs—

AMERICAN HONDA MOTOR COMPANY, INC.,

Respondent.

TRANSCRIPT OF PROCEEDINGS

January 24, 1984

IN ATTENDANCE:

CHIEF JUSTICE ROBERT W. WILENTZ
JUSTICE ROBERT L. CLIFFORD
JUSTICE SIDNEY M. SCHREIBER
JUSTICE ALAN B. HANDLER
JUSTICE STEWART G. POLLOCK
JUSTICE DANIEL J. O'HERN
JUSTICE MARIE L. GARIBALDI

APPEARANCES:

ROBERT H. JAFFE, ESQ., for Petitioner Coons
JOHN I. LISOWSKI, ESQ., for Respondent Honda
KARL ASCH, ESQ., Amicus Curiae
HARRY S. HAUSHALTER, D. A. G., for Intervenor-Respondent Attorney General
I. MICHAEL GREENBERGER, ESQ., for Amicus Curiae Brinco Mining, Ltd.
RAYMOND M. TIERNEY, JR., ESQ., for Amicus Curiae G. D. Searle & Co.

[2]* CHIEF JUSTICE WILENTZ: The next matter is A87-82, Coons versus American Honda Motor Company, Inc.

Mr. Jaffe?

* * * *

[5] THE COURT: When he [Mr. Coons] discovered that he had a cause of action what was the status of the law then?

MR. JAFFE: The status of the law when he discovered was July, 1978. That's when he received the Notice [6] of Recall from Honda—

THE COURT: Right—

MR. JAFFE: —indicating that there was a product defect and he connected in his mind the product defect to the fact that he was riding a motorcycle on October 30, 1974 that seemed to explode in mid-air.

* * * *

[6] MR. JAFFE: I think we have to explore what would have happened if he'd [Mr. Coons] gone to an attorney in July, 1978, ...

* * * *

[7] THE COURT: Would not a lawyer of average competence do more than check the annotations, in as much as he's now focused on a particularly critical point of law as far as his client is concerned. He'd do more than that, would he not?

MR. JAFFE: I—let's say that he was a lawyer of better than average competence, your Honor. He would be not only searching all the New Jersey cases, ... [8] And he would have also at that point probably have advised Mr. Coons to do what in fact happened, file his suit as quickly as possible and within a few months after receiving the notice on August, on October 30, 1978, Mr. Coons filed suit.

* * * *

---

* Original pagination is indicated in brackets.

[14] CHIEF JUSTICE WILENTZ: Mr. Asch?

* * * *

[18] THE COURT: Wasn't the long arm, the long arm rule applicable to these corporations as well? Couldn't you have effected service?

[19] MR. ASCH: The long arm rule certainly was applicable. If—

CHIEF JUSTICE WILENTZ: So you could have—your clients could have, or the other lawyers representing clients in your situation as you found yourself in, could have effected service on these foreign corporations anyway.

MR. ASCH: We did in fact effect service once we were contacted in, in the case, your Honor.

* * * *

84-385

Office-Supreme Court, U.S.
FILED
OCT 24 1984
ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1984

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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COUNTERSTATEMENT OF THE CASE

The petitioner, Honda Motor Co., Ltd., is seeking, by writ of *certiorari*, to have this Court review a decision by the Supreme Court of New Jersey holding that, based upon the balancing of equitable principles reaffirmed by this Court in numerous decisions, its previous declaration of invalidity of a portion of the New Jersey tolling statute, *N.J.S.A.* 2A:14-22,* on Commerce Clause grounds is to be prospectively applied as of August 3, 1983, the date of the declaration of invalidity. *N.J.S.A.* 2A:14-22 provides for a tolling of certain statutes of limitation against foreign corporations which are not represented in New Jersey for service of process.

---

*N.J.S.A. 2A:14-22 states that,

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

This matter commenced as a personal injury suit brought by the respondent, Walter P. Coons ("Coons"), in the Superior Court of New Jersey, Law Division. Coons was the owner of a Honda CB 350 motorcycle and was injured as a result of an accident on October 30, 1974 while riding the cycle. Coons instituted legal action on October 30, 1978 naming as the primary defendants Honda Motor Company, Ltd. ("Honda"), the manufacturer of the motorcycle, and American Honda Motor Co. ("American Honda"), the distributor of Honda products in the United States. American Honda is a California corporation that maintains facilities in New Jersey. Honda is a Japanese corporation which is not authorized to do business in New Jersey. American Honda was served with a summons and complaint by mail at its Moorestown, New Jersey facility. Service of process upon Honda was effected as a result of a court order permitting substituted service upon a Washington, D.C. law firm, which acted as Honda's agent under the Traffic and Motor Vehicle Safety Act, 15 *U.S.C.* 1399(e) (App. 65a-66a).

The trial court dismissed American Honda as a defendant because the suit was instituted beyond the two-year statute of limitations under *N.J.S.A.* 2A:14-2 (App. 71a). Honda thereafter filed a motion for summary judgment seeking dismissal of the suit also on the basis that the complaint was instituted beyond the two-year statute of limitations. The trial court denied the motion and held that the two-year statute had been tolled by *N.J.S.A.* 2A:14-22 since Honda was a foreign corporation which was not represented in this State by a person upon whom process could be served. The trial court further held that the statute was consistent with the Equal Protection

Clause of the Federal Constitution (App. 69a-70a). Upon appeal, the Superior Court of New Jersey, Appellate Division, affirmed the judgment of the trial court. Honda filed a motion for leave to appeal to the Supreme Court of New Jersey which was denied. Following the filing by Honda of a notice of appeal with this Court, an order was entered on March 8, 1982, vacating the judgment of the Appellate Division and remanding the matter to the Appellate Division for further consideration in light of *G.D. Searle & Company v. Cohn*, 455 *U.S.* 404 (1982). The Attorney General intervened on the remand in support of the constitutionality of *N.J.S.A.* 2A:14-22. In the *Searle* case, this Court sustained the validity of *N.J.S.A.* 2A:14-22 on Due Process and Equal Protection grounds, but remanded the case for further consideration in light of a Commerce Clause challenge. On September 14, 1982, the Supreme Court of New Jersey directly certified this case pending unheard in the Appellate Division.* (App. 73a).

On August 3, 1983, the New Jersey Supreme Court issued the opinion and judgment in *Coons v. American Honda Motor Company*, 94 *N.J.* 307, 463 *A.*2d 921 (1983) *(Coons I)*, which determined that,

> 1. The only formal means by which a foreign corporation can become represented and thus designate an agent for the purpose of accepting service of process in New Jersey is by receiving a certificate of authority from the New Jersey Secretary of State to do business in New Jersey under *N.J.S.A.* 14A:13-4.

---

*Pursuant to *N.J. Ct. R.* 2:12-2, the Supreme Court of New Jersey may directly certify an appeal pending unheard in the Superior Court, Appellate Division.

2. The only means by which a foreign, unrepresented corporation could avoid the tolling of the applicable statute of limitations under *N.J.S.A.* 2A:14-22 is by designating an agent upon whom process can be served in the context of securing a certificate of authority to do business in New Jersey from the New Jersey Secretary of State.

3. The tolling provision, *N.J.S.A.* 2A:14-22, is violative of the Commerce Clause of the United States Constitution because it imposes a "forced licensure" upon an unrepresented, foreign corporation by requiring a certificate of authority from the New Jersey Secretary of State as the only means for such corporation to be represented in New Jersey and thus avoid the tolling effect of the statute.

4. The decision is to,

> . . . be given retrospective effect, consistent with the general rule applied in civil cases that a new ruling shall apply to all matters that have not reached final judgment. See *Fox v. Snow*, 6 *N.J.* 12, 14 (1950). [App. 78a].

Following the decision in *Coons I*, Coons filed a petition for rehearing with the Supreme Court of New Jersey regarding all of the issues previously considered. The petition for rehearing was granted solely on the issue of retroactive application of the decision in *Coons I*. The Supreme Court of New Jersey thereafter issued an opinion and judgment, dated June 13, 1984, in *Coons v. American Honda Motor Co., Inc.*, 96 *N.J.* 419, 476 *A.*2d 763 (1984) *(Coons II)*, which held that the invalidity of *N.J.S.A.* 2A:14-22 on Commerce Clause grounds warranted a prospective application of *Coons I* as of August 3, 1983, the date of that decision. The prospective holding applied to all litigants, including the participating defendant and *amici*.

The Supreme Court of New Jersey, in reaching its decision on the prospectivity issue, applied the equitable balancing test best typified in *Chevron Oil Co. v. Huson*, 404 *U.S.* 97 (1971), and *Lemon v. Kurtzman*, 411 *U.S.* 1921 (1973) *(Lemon II)*. The court noted that since its decision in *Coons I* was the equivalent of a new rule of law clearly not anticipated and since justifiable reliance was placed on a system that provided for a tolling of statutes of limitation with respect to unrepresented, foreign corporations, the holding of prospectivity was proper and consistent with the relevant precedents of this Court.

ARGUMENT

In Accordance With The Equitable Standards Established By This Court, The Supreme Court Of New Jersey Correctly Determined To Apply The Invalidity Of N.J.S.A. 2A:14-22 On A Prospective Basis.

The applicable common law doctrine initially required the determination of a statute's unconstitutionality to be retroactive on the basis that the statute was ". . . inoperative as though it had never been passed." *Norton v. Shelton Cty.*, 118 *U.S.* 425 (1886). In *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 *U.S.* 371, 374 (1940), this Court recognized the *Norton* doctrine as being overly broad and subject to rejection in the context of public policy concerns regarding the justifiable reliance upon existing law:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have con-

> sequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determination deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Subsequent decisions by this Court have clearly eroded the *Norton* doctrine and have substituted an equitable balancing test to determine whether a statute's invalidity is to be prospectively or retroactively applied.

That balancing test is best illustrated in *Chevron Oil Co. v. Huson*, 404 *U.S.* 97 (1971), and *Lemon v. Kurtzman*, 411 *U.S.* 192 (1973) *(Lemon II)*. Prior to *Chevron, supra*, this Court held in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 *U.S.* 352 (1969), that state law rather than admiralty law, including state statutes of limitation, applied to personal injury actions relating to fixed structures on the Outer Continental Shelf. *Chevron* involved a suit for personal injury suffered by the plaintiff while working on the defendant's drilling rig located on the Outer Continental Shelf. At the time the *Chevron* suit was instituted, the two-year statute of limitations under admiralty law was deemed applicable. The *Chevron* suit was filed within two years of the injury but outside the one-year statute of limitations governing under state law. The *Chevron* Court noted that in the last few decades it had recognized the doctrine of nonretroactivity outside the criminal area many times in both constitutional and nonconstitutional cases (404 *U.S.* at 106) and translated those holdings into a three-part test to determine whether a retroactive application was warranted:

> In our cases dealing with the nonretroactive question, we have generally considered three separate

> factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., *Hanover Shoe v. United Shoe Machinery Corp., supra,* at 496, 20 *L.Ed.*2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Elections, supra,* at 572, 22 *L.Ed.*2d at 20. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra,* at 629, 14 *L.Ed.*2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma, supra,* at 706, 23 *L.Ed.*2d at 652. [404 *U.S.* at 106-107].

In applying these factors, this Court concluded that the state statute of limitations should not be applied retroactively. It noted that *Rodrigue, supra,* was not only a case of first impression but also overruled prior lower court decisions which were binding. It was thus proper for the plaintiff to have relied on the "existing" law at the time suit was instituted. This Court opined that substantial inequitable results would be produced by a retroactive application of *Rodrigue* since the plaintiff had suffered serious injury for which he may be barred from further relief because of a sudden change in the applicable statute of limitations.

In *Lemon II, supra,* in which this Court determined that its holding in *Lemon I** was to be given prospective effect, Chief Justice Burger, writing for the Court, held that the abandonment of the *Norton* doctrine was compelled by the "recognition that statutory or judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." 411 *U.S.* at 199. He stated that the process of reconciling constitutional concerns reflected in a new rule of law with reliance interests founded upon the old law presents a difficult issue which must incorporate various considerations, including the relations and conduct of parties, of rights that may have vested, of status, of prior determinations that have been deemed final and public policy. 411 *U.S.* at 199. He noted, however, that, "reliance interests must weigh heavily in the shaping" of proper equitable remedies. 411 *U.S.* at 203. Chief Justice Burger further stated that,

> Here, we are not considering whether we will apply a new constitutional rule of criminal law in reviewing judgments of convictions obtained under a prior standard; the problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional. . . . But however we state the issue, the fact remains that we are asked to re-examine the District Court's evaluation of the proper means of implementing an equitable decree. [411 *U.S.* at 199].

Lemon II is distinguishable from *Lemon I* (*Lemon* v. *Kurtzman,* 403 *U.S.* 602 (1971)), in which this Court invalidated a Pennsylvania statutory program to reimburse nonpublic sectarian schools for designated secular educational services.

Thus, the contention by petitioner that the issue of retroactivity-prospectivity in this matter involves questions of constitutional dimension is simply not accurate. This issue relates to essentially equitable considerations which must be closely scrutinized to reach a fair result.

The Supreme Court of New Jersey applied the principles enumerated in *Chevron* and *Lemon II* in determining that the invalidity of *N.J.S.A.* 2A:14-22 was to receive prospective application. Initially, in applying the three-part test of *Chevron,* the court noted that its holding of invalidity in *Coons I* under the Commerce Clause was not foreshadowed and constituted a new principle of law. The tolling statute, *N.J.S.A.* 2A:14-22, had been on the books since 1949 and a tolling provision had been a fixture of New Jersey law since 1820. See *Lemke v. Bailey,* 41 *N.J.* 295, 298, 196 *A.*2d 523, 525 (1963). The first mention of a potential Commerce Clause problem by an appellate court was this Court's decision in *G.D. Searle & Co. v. Cohn, supra.* Thus, as of 1978, the year in which plaintiff contemplated this law suit, there was no indication of the invalidation of the tolling statute as to foreign, unrepresented corporations on Commerce Clause grounds. The New Jersey Supreme Court thus aptly concluded that,

> Hence, the declaration of *Coons I* was hardly foreshadowed; and although the case did not literally alter precedent because there was none on the *holding* of the case, it amounted to a "statement" in a matter of first impression—and thus "new law." [App. 16a].

With regard to another facet of the *Chevron* test, the consideration of reliance, it is appropriate to recognize that potential New Jersey plaintiffs were justified in

relying on the existence of the tolling statute in believing that causes of action against foreign, unrepresented corporations would be preserved in New Jersey. Obviously, the retroactive invalidity of the tolling statute may forever bar such plaintiffs from instituting legal action in this State. For example, there may exist potential plaintiffs, who had a cause of action against a foreign, unrepresented corporate defendant which was amenable to long-arm service in New Jersey during the assumed tolling of the statute of limitations.* Such plaintiffs, in strict reliance on the tolling statute and for reasons of convenience, strategy, expense and the like, opted to refrain from utilizing long-arm service as the only available means for instituting action in this State within the statute of limitations. Such potential plaintiffs would be seriously prejudiced by a retroactive application of *Coons I* since, but for the tolling statute, timely suit would have been commenced in New Jersey. In addition, there may be potential plaintiffs who had a substantial cause of action against a foreign, unrepresented corporate defendant which was not amenable to long-arm service in New Jersey. Such plaintiffs, but for the tolling statute and the anticipation of filing suit in New Jersey sometime in the future, would have presumably made effort to institute action in a foreign jurisdiction in order to prosecute the cause of action. The expense and inconvenience of instituting such an action would have been justified in light of the seriousness and/or substantiality of the cause of

---

*In *Velmohos v. Maren Engineering Corp.*, 83 *N.J.* 282, 416 *A.*2d 372 (1980), the Supreme Court of New Jersey held that the tolling effect was applicable even to foreign, unrepresented corporations that were subject to long-arm service of process.

action. Clearly such plaintiffs would be severely prejudiced by a retroactive application of the tolling statute's invalidity particularly if the availability of the out-of-state forum were now foreclosed because the applicable statutes of limitation had run.

It is obviously difficult to gauge the number of plaintiffs that may be affected by a retroactive holding and it is also difficult to determine the prejudice to be suffered by those actual or potential plaintiffs who may have relied on the tolling statute. It is clear, however, that the tolling statute must have served a useful purpose in preserving causes of action for New Jersey residents regarding foreign, unrepresented corporate entities otherwise the New Jersey Legislature would not have enacted such a provision. The salutary purpose served by such legislation was unequivocally recognized in *G.D. Searle & Company v. Cohn, supra.* As previously noted, the tolling provision has represented a fundamental facet of New Jersey's jurisprudence for many years. The public had no basis for anticipating a judicial ruling that the tolling statute was invalid and, therefore, had no opportunity to structure its legal strategy accordingly. Thus, in fairness to potential or actual plaintiffs who justifiably relied on the validity of the tolling provision, the holding of unconstitutionality in *Coons I* was properly applied prospectively. Such a holding terminated the tolling of the statutes of limitation applicable to causes of action against foreign, unrepresented corporate defendants on August 3, 1983, the date of the decision in *Coons I,* and triggered the running of the statutes of limitation as of that date.

Further compounding the egregious inequity that would result from a retroactive holding of *Coons I* is the

recent amendment to *N.J.S.A.* 2A:14-22 by the enactment of New Jersey Public Law 1984, Chapter 131. This law was approved and became effective on August 23, 1984. The amendment added the following italicized paragraph to *N.J.S.A.* 2A:14-22:*

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:

---

*N.J. Public Law 1984, Chapt. 131, was introduced in the New Jersey Legislature as Senate Bill 953 (1984). The Senate Judiciary Committee Statement to Bill 953, dated February 23, 1984, clearly identifies that its purpose was to remedy the unconstitutional defect found in *Coons I:*

> *N.J.S.* 2A:14-22 tolls the running of the statute of limitations in civil actions against foreign corporations that are not represented in New Jersey and thus cannot be reached with service of process. This bill would provide that a foreign corporation would be deemed represented in New Jersey for the purpose of *N.J.S.* 2A:14-22 if the corporation filed with the Secretary of State a notice designating a representative to accept service of process.
>
> The bill was introduced in response to a recent New Jersey Supreme Court decision, *Coons v. American Honda Co., Inc.*, 94 *N.J.* 327 (1983). In that decision, the court determined that in order to be "represented" in the context of *N.J.S.* 2A:14-22, a foreign corporation must obtain a certificate to do business in New Jersey. The court ruled that this requirement was in violation of the commerce clause of the U.S. Constitution in that it unduly burdened interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain such a certificate.
>
> The filing of a notice designating a representative to accept process is a less burdensome requirement than obtaining a certificate to do business. Therefore, by providing that a foreign corporation would be deemed represented for purposes of *N.J.S.* 2A:14-22 if such a notice were filed, S-953 is intended to meet the Supreme Court's objections as stated in the *Coons* decision and thereby assist New Jersey citizens to pursue their claims against foreign corporations.

> 14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this State when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation. *A corporation shall be deemed represented for purposes of this section if the corporation has filed with the Secretary of State a notice designating a representative to accept service of process.*

The amendment to *N.J.S.A.* 2A:14-22 provides that foreign, unrepresented corporations may file a notice with the New Jersey Secretary of State designating a representative to accept service of process in order to be represented in New Jersey and thereby avoid the tolling effect. Accordingly, as of May 23, 1984, foreign, unrepresented corporations no longer need to obtain a certificate to do business in New Jersey as the sole means of avoiding the tolling effect of *N.J.S.A.* 2A:14-22. Therefore, the constitutional defect of the statute determined in *Coons I* has been cured.

In light of the statutory amendment, the equitable scales even more than ever tip in the direction of a prospective holding of *Coons I*. A prospective holding is clearly appropriate in order to maintain continuity in the judicial system and to avoid the disruptive effect of having certain causes of action against foreign corporations relating to a period after August 23, 1984 tolled while earlier causes of action would be barred by the applicable statutes of limitation.*

The final facet of the three-part test enunciated in *Chevron, supra,* relates to the purpose of the rule in *Coons I*. Clearly *Coons I* invalidated that portion of the tolling statute which violated the Commerce Clause. Notwithstanding petitioner's contention that the prospective holding of *Coons I* essentially perpetuates a wrong and results in a "new" violation of the Commerce Clause, that argument overlooks the equitable principles that must be considered in this analysis. This argument was considered and properly rejected by the Supreme Court of New Jersey:

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*As a practical matter, the prospective holding of *Coons I* as of August 3, 1983 does not create a significant gap in the tolling effect. The period between August 3, 1983 and August 23, 1984 (1 year and 20 days), a period during which there would be no tolling effect upon foreign, unrepresented corporations under a prospective holding of *Coons I*, is relatively short and would only affect those limited causes of action subject to a 1 year statute of limitations and occurring between August 3, 1983 and August 22, 1983. The only applicable statute with a 1 year limitation is *N.J.S.A.* 2A:14-3, which relates to libel and slander actions. Thus, a prospective holding of *Coons I*, in light of the recent statutory amendment, would retain the tolling effect for most causes of action involving foreign, unrepresented corporate defendants without any gap.

> Finally, following *Chevron, supra,* 404 *U.S.* at 106-07, 30 *L.Ed.*2d at —, we look to the purpose of the rule in *Coons I.* In its starkest terms, that determination had as its purpose the outlawing of so much of the tolling statute as violates the commerce clause. Defendant contends that not to apply the ruling retroactively would be to countenance unconstitutionality. But the argument overlooks the balancing of interests and impact, called for by our commitment to equitable principles. Those concerns are addressed above—the reliance of plaintiff and those similarly situated, and the absence of any showing that in fact defendant and corporate *amici* suffered a burden borne of a compulsion to register in New Jersey to permit recourse to the statute of limitations. On balance we are satisfied that the purpose of the prior ruling is fulfilled by excluding from the scope of the *Coons I* ruling only those actions already commenced as of August 3, 1983. [App. 18a].

Therefore, the Supreme Court of New Jersey appropriately concluded that the invalidity of the tolling statute does not warrant a *per se* retroactive holding. The reliance factor and concepts of equity, which support a prospective holding, are critical considerations in this analysis which the petitioner simply ignores. Thus, the prospective application of *Coons I* is consistent with the three-part test articulated in *Chevron, supra,* and comports with the equitable standards applied by this Court in civil litigation.

Petitioner suggests that the propriety for applying the balancing test in *Chevron, supra,* to determine issues of prospectivity-retroactivity has been severely undercut by *Lemon II, supra, New York v. Cathedral Academy,* 434 *U.S.* 124 (1977), and *United States v. U.S. Coin & Currency,* 401 *U.S.* 715 (1971), and that a *per se* rule of retroactivity should be applied where a state civil statute is

held unconstitutional. That conclusion is simply unsubstantiated by those decisions and is clearly incorrect. As previously noted, *Lemon II, supra,* reinforces the application of the equitable balancing test enunciated in *Chevron, supra,* in determining the propriety for prospective application of a judicial ruling declaring a state law unconstitutional. In *New York v. Cathedral Academy, supra,* a New York statute reimbursing religious schools for certain expenses was struck as unconstitutional. This statute was enacted *after* a Federal District Court had declared unconstitutional a similar statute relating to the previous school year. This Court, in applying the equitable considerations discussed in *Lemon II,* found a retroactive holding of the statute's invalidity proper since the New York legislature was aware of such invalidity at the time of enactment, since reliance on such ostensibly defective legislation was unwarranted and since a prospective holding would encourage state legislatures to undermine judicial rulings in the future. 434 *U.S.* at 130. Therefore, in applying the equitable balancing test in *New York v. Cathedral Academy, supra,* this Court concluded that a retroactive invalidation of the statute was proper, but only on grounds of equity and policy and not based on an alleged *per se* rule of retroactivity.

Similarly, no express or implied *per se* retroactivity standard can be surmised from *United States v. U.S. Coin & Currency,* 401 *U.S.* 715 (1971), in which this Court held that previous decisions interpreting the Fifth Amendment privilege against self incrimination to prohibit criminal convictions of gamblers who did not file required registration statements were to be retroactively applied. More recently, in *State v. Johnson,* 457 *U.S.* 537 (1982), in which a Fourth Amendment construction was deemed applicable

to all convictions not yet final at the time of the decision, this Court established that, in the criminal law context, a prospective holding would be proper if a decision constituted a "clean break with the past." The *Johnson* "clean break" test was somewhat modified in *Solem v. Stumes*, 55 *U.S.L.W.* 4307 (Feb. 29, 1984), holding that *Edwards v. Arizona*, 451 *U.S.* 477 (1984) (which established that once a suspect has invoked the right to counsel, any subsequent initiation of conversation by one other than the suspect violates that right) was to be applied prospectively because it constituted a new rule despite absence of a "clean break with the past." Thus, even in the criminal area, where a much stricter standard of retroactivity has been applied by this Court, a *per se* rule of retroactivity is not currently in vogue.

Moreover, petitioner overlooks a host of decisions by this Court which have sustained a prospective application of a holding that a civil statute is unconstitutional. See *Los Angeles Dept. of Water and Power v. Manhart*, 435 *U.S.* 702 (1978) (holding that sexual discrimination in funding of pension plan was to be prospectively applied in order to avoid disruption of the pension system and in recognition of valid reliance on the existing funding mechanism); *Buckley v. Valeo*, 424 *U.S.* 1 (1976) (a finding that certain facets of the Federal Election Campaign Act were unconstitutional was prospectively applied, thus granting Federal Election Commission's past decisions *de facto* validity based on considerations of reliance and sound public policy);* *Cipriano v. City of Houma*, 395 *U.S.* 701

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*In *Buckley v. Valeo, supra,* this Court further established that its holding was to be effective 30 days from the date of the decision in order to allow Congress an opportunity to rectify the provisions of the Federal Election Campaign Act found invalid.

(1969), and *City of Phoenix v. Kolodziejski*, 399 *U.S.* 701 (1970) (sustaining previous municipal financing arrangements later declared unconstitutional on the grounds of equitable principles); *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (recognizing the validity of past elections of local officials notwithstanding a finding that such elections were unconstitutional in order to avoid disrupting the local governing system). In each of these decisions relating to noncriminal litigation, the concern of this Court focused on legitimizing past conduct premised on lawful standards. Such a result comports with " . . . one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio School District v. Rodriguez*, 411 *U.S.* 160 (1973) (Stewart, J., concurring).

The further contention by petitioner that the Supreme Court of New Jersey misconceived the prospective-retroactive determination as being a matter of "state law" is of no merit. As a practical matter, the Supreme Court of New Jersey applied the precedents established by this Court and explicitly noted that, "[t]he development of New Jersey's retroactivity law has proceeded on a track roughly paralleling that represented by the cases" decided by this Court (App. 11a). The Supreme Court of New Jersey, in framing the relief to be granted the petitioner, was possessed of "a large measure of . . . discretion . . . in deciding both the issues of prospective application or retrospective application and the time for which the new principle is to be deemed controlling." *State v. Vigliano*, 50 *N.J.* 51, 65-66, 232 *A.*2d 129 (1967), cited with approval in *Jenkins v. Delaware*, 395 *U.S.* 213, 218 (1969).

This large measure of discretion is best illustrated in *Bacchus Imports, Ltd. v. Dias,* 52 *U.S.L.W.* 4979 (June 29, 1984), which declared a Hawaii taxing statute, granting tax preferences to certain domestically produced wine and liquor manufacturers, in violation of the Commerce Clause. Having declared the taxing act unconstitutional, this Court was faced with the dilemma of formulating an appropriate remedy as to the extent and propriety of any refund claim. With respect to that issue, this Court stated that,

> These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts. Also, the Federal constitutional issues involved may well be intertwined with, or their consideration obviated by, *issues of state law.* Also, resolution of those issues, if required at all, may necessitate more of a record than so far has been made in this case. We are reluctant, therefore to address them in the first instance. Accordingly, we reverse the judgment of the Supreme Court of Hawaii and remand for further proceedings not inconsistent with this opinion. [52 *U.S.L.W.* at 4983; emphasis supplied].

Thus, the means for formulating an appropriate remedy to implement the holding in *Bacchus, supra,* were left to the state court. Similarly, in *Salorio v. Glaser,* 93 *N.J.* 447, 461, *A.*2d 1100 (1983), *cert. den.,* 52 *U.S.L.W.* 3422 (Nov. 28, 1983), this Court declined to review a decision by the Supreme Court of New Jersey which gave a prospective application to the holding that the New Jersey Emergency Transportation Tax is unconstitutional. These cases further illustrate the wide latitude this Court has permitted the state courts in shaping remedies in light of an unconstitutional holding of a state law. This defer-

ence is based on the ability of state judiciaries to be more familiar with local concerns so as to balance the relevant equitable considerations and thereby formulate proper remedies.

The determination by the Supreme Court of New Jersey in *Coons II* comports with this Court's consistent confidence in the competency of the State judiciary to adjudicate and safeguard federal constitutional rights. In strict adherence to the standards to be considered in determining issues of retroactivity-prospectivity proclaimed by this Court, the New Jersey Supreme Court balanced the interests of actual or potential plaintiffs, the public policy of preserving causes of action and the consequences of a prospective holding of *Coons I*. The lower court's evaluation was based on reason and fairness in a manner consistent with the rulings of this Court. Clearly, the decision in *Coons II* of establishing a prospective holding for *Coons I* was proper and sound.

The petition for writ of *certiorari* plainly does not present a question of constitutional dimension which would warrant the granting of such extraordinary relief. Therefore, the petition should be denied.

———o———

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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No. 84-385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONDA MOTOR COMPANY, LTD.,

Petitioner,

vs.

WALTER P. COONS,

Respondent.

RESPONDENT WALTER P. COONS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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RESTATEMENT OF QUESTION PRESENTED

I. Does the ruling by the New Jersey Supreme Court in *Coons II*—which accorded prospective application "across the board" to its judgment in *Coons I* invalidating the New Jersey tolling statute on Commerce Clause grounds—constitute an important public question mandating the grant of a writ of certiorari.

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STATEMENT OF THE CASE

A. *Factual and Procedural Background*

In the interest of brevity, respondent Walter P. Coons ("Coons") hereby incorporates by reference pages 8 through 10 of his Cross-Petition for a Writ of Certiorari. The factual and procedural background applicable to the cross-petition is in like manner pertinent to this response to the petition of Honda Motor Company, Ltd. ("Honda").[1]

B. *Summary of Opinion in Coons II*

In *Coons v. American Honda Motor Co.*, a decision reported at 94 N.J. 307, 463 A.2d 921 (1983) (*"Coons I"*) and authored by Justice Robert L. Clifford, the New Jersey Supreme Court held that the state tolling statute, *N.J.S.A.* 2A:14-22, was "a forced-licensure provision." Honda App. at 40a.[2] The court's holding was predicated on a narrow interpretation of the term "represented" as used in the statute—that corporations dealing exclusively in interstate commerce had to obtain a certificate to do business in order to gain the advantage of New Jersey statutes of limitation. Honda App. at 37a. By a 4-3 vote, a majority of the court concluded that the tolling statute violated the Commerce Clause. Honda App. at 40a. The majority opinion then went on to state:

> "This decision should be given retroactive effect, consistent with the general rule applied in civil cases that a new ruling shall apply to all matters

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1. The brief of respondent Attorney General of New Jersey also contains a pertinent procedural and factual history. See Brief of Attorney General of New Jersey In Opposition to Petition For a Writ of Certiorari at pages 1-5.

2. "Honda App. at 40a" refers to page 40 of Honda's Appendix to Petition for a Writ of Certiorari.

that have not reached final judgment. See *Fox v. Snow*, 6 N.J. 12, 14, 76 A.2d 877 (1950)." *Id.*

Coons filed a timely petition for rehearing asserting, *inter alia*, that the decision in *Coons I* should be applied prospectively, not retroactively. Honda App. at 3a-4a. Limiting its grant of the petition to that question, in a decision reported at 96 N.J. 419, 476 A.2d 763 (1984) ("*Coons II*") also authored by Justice Clifford, the New Jersey Supreme Court graciously acknowledged its earlier statement to apply *Coons I* retroactively was "ill-considered." Honda App. at 7a.

As part of its June 18, 1984 ruling in *Coons II* to accord prospectivity "across the board," the court held that the judgment in *Coons I* would be made effective as of August 3, 1983, the date that decision was rendered. Honda App. at 18. This meant, for example, that if a New Jersey litigant had a claim for personal injuries similar to that asserted by Coons against an unregistered foreign corporation such as Honda arising out of an accident that occurred before August 3, 1983, pursuant to the two year statute of limitations for such claims provided under *N.J.S.A.* 2A:14-2, his or her complaint had to be filed on or before August 3, 1985. Honda App. at 23a.

Before articulating the grounds for its decision in *Coons II*, the New Jersey Supreme Court discussed and analyzed the equitable principles employed when dealing with retroactivity problems in state and federal cases such as the following: *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983), cert. denied, 78 L.Ed.2d 682 (1983); *Oxford Consumer Discount Co. v. Stefanelli*, 104 N.J. Super. 512, 250 A.2d 593 (App. Div. 1969), modified, 55 N.J. 489, 262 A.2d 874 (1970), appeal dismissed, 400 U.S. 923, 27 L.Ed.2d 182 (1970); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed.2d 296 (1970); *Lemon v. Kurtzman*, 411 U.S. 192, 36 L.Ed.2d 151 (1973)

("Lemon II"); and *Wachovia Bank & Trust v. National Student Marketing*, 650 F.2d 342 (D.C. Cir. 1980). In the course of this analysis, Justice Clifford observed that the "balancing test" for dealing with retroactivity problems are perhaps "best typified" by this Court's opinions in *Chevron* and *Lemon II*. Honda App. at 9a.

Specifically addressing the argument made by Honda and its supporting corporate *amici* that "not to apply the ruling (in *Coons I*) would be to countenance unconstitutionality," Justice Clifford first made reference to the three factors enunciated in *Chevron* for dealing with retroactivity problems in civil actions and then responded:

> "But the argument overlooks the balancing of interests and impact, called for by our commitment to equitable principles. Those concerns are addressed above—the reliance of plaintiff and those similarly situated, and the absence of any showing that in fact defendant and corporate *amici* suffered a burden borne of a compulsion to register in New Jersey to permit recourse to the statute of limitations." Honda App. at 18a.

Turning to the issue of whether Honda, as the putative successful litigant—or any of its supporting corporate *amici* "as champions of the cause"—should be given the benefit of the ruling in *Coons I*, the majority in *Coons II* perceived "no injustice in limiting the operative time of *Coons I* to the date of that decision, August 3, 1983." *Id.*

Although acknowledging the pertinency of the argument made by Honda that "ordinarily the fruits of the struggle are awarded the successful litigant," a majority of the New Jersey Supreme Court found that according prospectivity "across the board" to the judgment in *Coons I* so as to allow Coons and associated *amici* an

opportunity to pursue their product liability claims in state court on the merits was justified on two express grounds. *First*, that the defendant unregistered foreign corporation and its supporting corporate *amici* were "institutional litigants" that would in the future "frequently" resort to and receive the benefit of New Jersey statutes of limitations. *Id. Second*, that "the hiatus effected by our conclusion in this regard affords the New Jersey Legislature an opportunity to address any public policy concerns that are implicated by *Coons I*."[3] Honda App. at 19a.

Justice Marie Garibaldi, after conceding that the judgment in *Coons I* met the first criteria of *Chevron* since it "amounted to a statement of first impression" which "established a new rule of law," Honda App. at 25a, disagreed with the majority's application of the second and third *Chevron* tests—stated as being whether retroactive application of a decision which establishes a new principle of law would further or retard the new rule and whether retroactive application would work an injustice upon those who had reasonably relied upon the old rule. Honda App. at 24a.

As to the second criterion, Justice Garibaldi stated that when a law cannot withstand a constitutional challenge, "only extraordinarily strong policy reasons (as

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3. The New Jersey Legislature did not take long to respond. Effective August 23, 1984, *N.J.S.A.* 2A:14-22 was amended to define the term "represented" so that a foreign corporation engaged solely in interstate commerce need not register to do business in New Jersey to obtain the benefit of that sovereign state's statutes of limitations. As the Accompanying Statement to Senate Bill No. 953 makes abundantly clear, the legislation was enacted to continue without interruption the procedural remedy New Jersey residents obtained by virtue of the tolling statute against often difficult to locate unrepresented foreign corporations. See Coon's Cross-Petition and Appendix For a Writ of Certiorari in Case No. 84-591 at pages 1a-2a.

present in *Salorio*) justify limiting the new rule to prospective application." Honda App. at 25a.

Applying the third *Chevron* criterion, the dissenter contended that the record of this case failed to indicate Coons or his associated *amici* placed actual reliance upon the tolling statute in not bringing suit prior to the expiration of applicable statutes of limitations. As to the respondent, Justice Garibaldi stated: "Plaintiff Coons brought suit against Honda as soon as he realized he had a cause of action." *Id.*

Justices Schreiber and Pollock joined in that part of the dissent which argued for the proposition that Honda as the putative successful litigant and its supporting corporate *amici* should have received the benefit of the ruling in *Coons I*. Honda App. at 20a-23a. The remaining two members of the court otherwise agreed with the majority in *Coons II* that the judgment in *Coons I* should be given prospective effect.

Honda filed a timely petition with the New Jersey Supreme Court seeking a stay of the prospectivity ruling in *Coons II* until a determination on its then forthcoming petition for a writ of certiorari. The court below responded with an order dated July 13, 1984 granting a temporary stay for the stated purpose of giving the petitioner sufficient time to seek a stay of judgment from this Court. On July 31, 1984, this Court denied Honda's petition for a stay of the judgment in *Coons II*.

C. *Issues Raised by Honda's Petition*

In its petition, Honda contends that *Coons II* raises at least four issues deserving of review by this Court. Listing them in the order presented they can be summarized as follows:

1. Whether, if left uncorrected, the New Jersey Supreme Court's statement that it relied on state law

when it decided to accord prospective application to *Coons I* provides a means for state courts to circumvent enforcement of federal constitutional rights. Honda Petition at 10-12.

2. Whether the prospectivity holding in *Coons II* has created a new and independent violation of the Commerce Clause in direct conflict with decisions of this Court recognized as controlling in *Coons I*. Honda Petition at 12-18.

3. Whether, assuming *arguendo* that the decision of the court below could be read as an attempt to govern its decision in *Coons I* by application of the *Chevron* "balancing test," it misapplied that case's criteria. Honda Petition at 18-24.

4. Whether the New Jersey Supreme Court may deny the benefit of the ruling in *Coons I* to Honda and its supporting corporate *amici* on the ground they are "institutional litigants." Honda Petition at 25-26.

In a footnote, Honda Petition at 20, Honda also suggested that an additional reason for granting review would be to clear up what it contended was a disagreement between members of this Court over the scope of the decision in *United States v. Johnson*, 457 U.S. 537, 73 L.Ed.2d 202 (1982). Cited as an example was what appeared to be conflicting opinions rendered in the criminal case of *Solem v. Stumes*, 79 L.Ed.2d 579 (1984), dealing with the "clear break" test.

The first three issues alleged by Honda to arise out of *Coons II* clearly overlap. The petitioner has seized upon and distorted the statement made by Justice Clifford in *Coons II* that "as a matter of state law" *Coons I* is to be applied prospectively. The fact remains, as the third issue identified by Honda appears to concede, that the New Jersey Supreme Court arrived at the judgment

in *Coons II* by careful application of equitable principles dealing with retroactivity problems drawn from decisions of this Court and other federal courts as well as its own state decisions. Honda App. at 7a.

Similarly, the fourth issue as identified by Honda takes out of context one phrase employed by the court to support its ruling that prospectivity would be accorded "across the board" so as to include the respondent and his associated *amici*. The public policy considerations which caused the New Jersey Supreme Court, "aided by full briefing and argument," Honda App. at 7a, to allow Coons and many other similarly situated persons a reasonable time subsequent to August 3, 1983 to file suit against the unregistered foreign corporate defendant and its supporting corporate *amici*, however, go far beyond the characterization of these persons as "institutional litigants."

Honda's argument that the court below failed to apply the "clear break" criteria for the establishment of a new rule of law, citing *United States v. Johnson*, 457 U.S. 537, 549-554, 73 L.Ed.2d 202, 213-217 (1982), is also totally misplaced. The decision in *Johnson* was made in the context of a criminal case as it was in *Solem v. Stumes*. However, the petitioner ignores the statement in *Johnson*, duly noted by Justice Clifford in *Coons II*, Honda App. at 15a, that "all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron* . . ." 457 U.S. at 562, 73 L.Ed.2d at 222-223. Accordingly, the question of the scope to be afforded the decision in *Johnson* is a non-issue and merits no further discussion in this brief.[4]

4. Although Coons expressed disagreement in his cross-petition with the New Jersey Supreme Court's ruling which invalidated the tolling statute on Commerce Clause grounds, for the purposes of this brief, the respondent—the same as any other New Jersey litigant—will consider himself bound by the judgment in *Coons I* as modified by the ruling on prospectivity in *Coons II*. See *Winters v. New York*, 333 U.S. 507, 514, 92 L.Ed. 840, 849 (1948).

ARGUMENT

The ruling of the New Jersey Supreme Court in Coons II *according prospective application "across the board" to its judgment in* Coons I *that the New Jersey tolling statute,* N.J.S.A. *2A:14-22, violates the Commerce Clause fails to raise any important public question mandating the grant of a writ of certiorari*

Honda, as the petitioner in this case, must convince this Court that the prospectivity ruling in Coons II falls within the category of those considerations which merit review on certiorari.[5] This principle was masterfully expressed by Justice Frankfurter in a critique of the predecessor to this Court's Rule 17 (then Rule 19):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." (Citations omitted.) *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 99 L.Ed. 897, 901 (1954).

This case is clearly a civil case. At least since 1971 this Court has consistently applied the criteria for retroactivity in civil cases set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 30 L.Ed.2d 296 (1971). So did the New Jersey Supreme Court in *Coons II.* Honda App. at 9a-10a. It is equally beyond dispute that the federal constitution has no voice upon the subject of retroactivity. *Great Northern Railroad Co. v. Sunburst Oil &*

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5. See Supreme Court Rule 17 entitled "Considerations Governing Review of Certiorari."

Refining Co., 287 U.S. 358, 364, 77 L.Ed. 360, 366 (1932) (J. Cardozo); *United States v. Johnson*, 457 U.S. 537, 542, 73 L.Ed.2d 203, 208 (1982).

As authority for its ruling to afford prospective application to the judgment in *Coons I* which invalidated a state statute on constitutional grounds, New Jersey's highest court cited as authority this Court's decision in *Lemon v. Kurtzman*, 411 U.S. 192, 36 L.Ed.2d 151 (1973) ("Lemon II"). Honda App. at 10a-11a. In *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745 (1971) ("*Lemon I*"), this Court had held unconstitutional a Pennsylvania statute under which the Commonwealth of Pennsylvania reimbursed private sectarian schools for designated secular educational service. Issues then arose with respect to reimbursement of funds previously paid. On remand, the district court permitted the Commonwealth to pay the schools for services rendered before the Supreme Court's decision in *Lemon I*.

Affirming the judgment of the district court, Chief Justice Burger authored an opinion in *Lemon II* which stated in pertinent part that retroactivity depended upon a consideration of particular relations between and the conduct of the parties, rights that had vested, of status, of prior determinations deemed to have finality, and of public policy. 411 U.S. at 199, 36 L.Ed.2d at 160. As duly noted by Justice Clifford for the court below, Honda App. at 10a-11a, this Court in *Lemon II* stressed the fact that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and shaping their conduct." *Id.* Concluding his discussion, Justice Burger observed that equitable remedies touching upon retroactivity questions "are a special blend of what is necessary, what is fair and what is workable." 411 U.S. at 200, 36 L.Ed.2d at 161.

Only after an analysis of *Chevron*, *Lemon II* and another clearly applicable federal case, *Wachovia Bank & Trust Co. v. National Student Marketing*, 650 F.2d 342 (D.C. Cir. 1980)—the latter holding that *Chevron* mandates nonretroactive application of statute of limitation decisions that overrule the weight of past precedent—Justice Clifford turned to state decisions dealing with the retroactivity question such as *Oxford Consumer Discount Co. v. Stefanelli*, 104 N.J. Super. 512, 250 A.2d 593 (App. Div. 1969), modified, 55 N.J. 489, 262 A.2d 874 (1970), appeal dismissed, 400 U.S. 923, 27 L.Ed.2d 182 (1970), a decision characterized by the majority opinion as one that "anticipated the *Chevron* and *Lemon II* analysis at least to the extent of its heavy emphasis on the element of reliance."[6] Honda App. at 11a.

To be sure, the majority opinion discusses state cases which applied *Chevron* or equitable principles similar to those enunciated in that seminal case which held for prospective application of decisions establishing new rules of law. The case given the most extensive consideration was *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983), cert. denied, 78 L.Ed.2d 682 (1983). That case in turn predicated its prospectivity ruling on this Court's decision in *Lemon II*. The June 8, 1983 ruling in *Salorio*, as in *Coons II*, also did not immediately enjoin all unconstitutional conduct of the state in reliance on the New Jersey Emergency Transportation Tax Act, *N.J.S.A.* 54:8A-1 *et seq.* Instead, its effective date was established

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6. The decision in *Oxford Consumer Discount Co. v. Stefanelli* is particularly instructive for the test established by Appellate Judge (later acting Justice) Milton B. Conford for the existence of reliance by laymen on prior law. As formulated by Judge Conford, that test was what legal counsel of average competence would have advised a client about the status of the law at the time the cause of action arose. 104 N.J. Super. at 523; 250 A.2d at 599.

as January 1, 1984, a date which would "coordinate with the fiscal year of most individuals" and which would minimize "bookkeeping or related problems" for employers and employees. 93 N.J. at 468; 461 A.2d at 1111.

Having identified the relevant state and federal authority on which the majority opinion would predicate its judgment, *Coons II* applied what was styled "the *Chevron-Salorio* formulation" to the specific facts of this case to reach a determination that prospectivity should be accorded "across the board":

> "It is clear that *Coons I* satisfied the *Chevron-Salorio* formulation of how the requirement of establishing a new principle of law may be met. We must look to the law as it was at the time plaintiff contemplated starting suit, namely, 1978. See *Wachovia Bank & Trust v. National Student Mktg., supra*, 650 F.2d at 347. It had been on the books since 1949, see *Coons I, supra*, 94 N.J. at 313 [463 A.2d at 925], and a tolling provision in some form had been a fixture of our law for over a century and a half, its origins being traceable to 1820, see *Lemke v. Bailey*, 41 N.J. 295, 298 [196 A.2d 523, 524] (1963). . .
>
> Turning to the critically important factor of reliance, we focus at the outset on which it is that litigants 'may have relied' on in 1978—a long standing statute that announces that as to foreign, unrepresented corporations, no action need be taken . . .
>
> (W)e conclude that given the nature of this statute, we are justified in presuming that because of the tolling feature, many suits may not have been brought against unrepresented foreign corporations. The foreign corporations did not take any action to avoid whatever vulnerability the enact-

> ment created; they did not register in New Jersey. *The history of non-action by both those corporations and potential plaintiffs satisfies us that participants in the events before us ordered their affairs in accordance with the tolling statute. . .*
>
> Some level of generality is required. The result we achieve satisfies that need while at the same time honoring the equitable considerations that must inform our decision." (Emphasis added.) Honda App. at 15a-18a.

The decision of the New Jersey Supreme Court to accord prospectivity to its judgment in *Coons I* so as to allow the respondent and his associated *amici* their day in court is not an exception to the general rule that "champions of the cause" should be awarded for their effort and expense in challenging existing law.[7] As the majority opinion perceptively observed, Honda and its supporting corporate *amici* are institutional litigants. This designation gives recognition to the fact that this case is not the only products liability suit they will have to defend in a New Jersey court. Unless extraordinary care is taken to improve their products, future New Jersey litigants will receive personal injuries as a proximate

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7. While Justice Clifford acknowledged that *amici* G.D. Searle and Kelsey-Hayes had originated the prevailing theory in *Coons I* and *amicus* Brinco Mining Limited "has with great tenacity and persistence espoused the cause (of constitutional invalidity on Commerce Clause grounds)," Honda App. at 18a, the fact remains that Honda never raised the Commerce Clause issue until directed to do so by the New Jersey Appellate Division after remand by this Court for further proceedings in light of the decision in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 71 L.Ed.2d 250 (1982). This was acknowledged by Honda in the initial brief it filed with the Appellate Division in this case: "(I)t is respectfully submitted by appellant that the failure to raise the (Commerce Clause) issue prior to remand has no bearing on the issues now to be decided as such resolution has evidently been mandate(d)." Honda Brief on Remand at 3.

cause of product defects these institutional litigants place in the stream of interstate commerce. Notwithstanding, as a direct result of the decision by the court below in *Coons II*, commencing August 3, 1985 all such often difficult to locate unrepresented foreign corporations—assuming that *N.J.S.A.* 2A:14-22 had not been amended—would have had the benefit of a statute of limitations defense without being "burdened" by any requirement to register to do business in the State of New Jersey.

There is good precedent in federal case law for rulings which permit the plaintiff and similarly situated persons to proceed to judgment notwithstanding the success of the defendant in changing applicable law. This is particularly the case where, as in *Coons I*, the decision effectively shortens the applicable statute of limitations:[8] See *Jackson v. City of Bloomfield*, 731 F.2d 652, 655 (10th Cir. 1984) ("We will not bar plaintiffs' right to their day in court when their action was timely under the law in effect at the time their suit was commenced."); *Wachovia Bank & Trust v. National Student Marketing*, *supra*, 650 F.2d at 348 ("It would also produce the most 'substantial inequitable results' to hold that [appellants] 'slept on [their] rights' at a time when [they] could not have known the time limitation that the law imposed upon [them]," citing *Chevron*, 404 U.S. at 108, 30 L.Ed.2d at 306-307); see also *England v. Louisiana Medical Examiners*, 375 U.S. 411, 421-422, 11 L.Ed.2d 440,

8. There is venerable authority that strongly suggests that if the New Jersey Supreme Court in *Coons II* did not provide a fair and reasonable opportunity for New Jersey litigants to adjust to the new statute of limitations rule established by *Coons I*, its judgment in that case would have been unconstitutional. See *Sturges v. Crowninshield*, 4 Wheat 122, 207, 4 L.Ed. 529, 551 (1817) (C.J. Marshall); *Terry v. Anderson*, 95 U.S. 628, 632-633, 24 L.Ed. 365, 366 (1877) (C.J. Waite).

448-449 (1964) (holding that graduates of chiropractic schools would not be barred from litigating federal claims against the defendant state board of medical examiners in federal court although they were the plaintiffs in a case which established a new rule of law requiring specific preservation of a plaintiff's right to return to federal court when exhaustion of state remedies mandates prior litigation in state court.)

On closer examination, the decision of the majority in *Coons II* is totally consistent with the general rule that those who champion the cause should benefit by their efforts. It was Coons who filed the petition for rehearing which led to that decision. It was Coons who marshalled the resources of associated *amici* such as Karl Asch, Esq. and the Association of Trial Lawyers of America, New Jersey affiliate ("ATLA-NJ")[9] in support of prospective application of *Coons I* and who orally presented the argument for that cause before the court below. Would it not be ironic as well as unjust for other New Jersey litigants to receive the benefit of prospective application obtained by the judgment in *Coons II* while respondent Coons and his associated *amici*—the proponents and champions of that gracious ruling—are denied the same benefit.

What was described in the majority opinion as "public concerns that are implicated by *Coons I*," Honda App. at 19a, provides further support for according prospectivity "across the board." The decision in *Coons I*

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9. Mr. Asch filed a brief and presented oral argument in *Coons II*. Mr. Asch's law firm represents several hundred plaintiffs in various asbestos cases pending against institutional litigants such as Honda's supporting corporate *amicus* Brinco Mining Limited. The brief filed by ATLA-NJ was cited by the majority opinion in *Coons II* for that organization's concern that the court's ultimate decision on the prospectivity question would directly affect numerous New Jersey litigants. Honda App. at 4a.

turned on a highly technical and restrictive reading of the term "represented" requiring foreign corporations engaged exclusively in interstate commerce to register in order to obtain the benefit of a limitations defense. The "hiatus" spoken of in *Coons II* afforded the New Jersey legislature a fair opportunity—and one promptly acted upon—to clarify the term "represented" by an amendment of *N.J.S.A.* 2A:14-22.[10]

Since the question of what constitutes "representation" for the purposes of the New Jersey tolling statute has been resolved by a legislative act designed to correct the constitutional defect ruled upon in *Coons I*—assuming *arguendo* that there is any merit to Honda's contention it has been deprived of the fruits of its struggle—the petitioner and its supporting corporate *amici* are in circumstances analogous to the posture of the petitioner in *Rice v. Sioux City Cemetery, supra.*[11]

On rehearing, this Court became cognizant for the first time that the state of Iowa had enacted a statute which prohibited persons such as the defendant from including racially restrictive covenants in burial contracts. Based on this information, Justice Frankfurter,

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10. The enactment of amended *N.J.S.A.* 2A:14-22, however, should not foreclose review on certiorari of whether the New Jersey Supreme Court erred when it rendered the judgment in *Coons I.* In fact, reversal of that decision will serve to prevent future litigation over the recent amendment to *N.J.S.A.* 2A:14-22. It will also serve to demonstrate that application of Commerce Clause standards does have some limits when applied to statutes of limitation which have traditionally been deemed to be part of the *lex fori* or remedial procedures and court rules of every sovereign state. *Hawkins v. Barney's Lessee*, 5 Peters 457, 466-467, 8 L.Ed. 190, 193-194 (1831).

11. The petition filed by Honda on September 11, 1984 makes no reference to the fact that *N.J.S.A.* 2A:14-22 was amended on August 23, 1984 to include a definition of "represented" which was designed to correct the deficiency in the scope of that term found in *Coons I.* See footnote 3, *supra.*

speaking for the majority, held that the existence of that remedial Iowa statute merited reconsideration of whether the case was one in which there were special and important reasons for granting the writ of certiorari:

> "Had the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such isolated significance that it would hardly have been brought here in the first instance." (footnote omitted) *Rice v. Sioux City Cemetery, supra*, 349 U.S. at 76-77, 99 L.Ed. at 903.

Quoting Chief Justice Taft for the proposition that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties", *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393, 67 L.Ed. 712, 714 (1923), this court dismissed the writ of certiorari in *Rice v. Sioux City Cemetery* as having been improvidently granted.

To sum up, the grounds advanced by Honda in its petition simply do not reach the standard for considerations governing review on certiorari announced by this Court in Rule 17 and applicable case law.[12] The majority opinion in *Coons II* heeds the admonition of this Court in *Lemon II* that when dealing with retroactivity problems what should be applied is a special equitable blend of "what is necessary, what is fair, and what is workable." Although the New Jersey Supreme Court in *Coons*

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12. To the extent that it may be appropriate to distinguish the cases of *New York v. Cathedral Academy*, 434 U.S. 125, 54 L.Ed.2d 346 (1977) and *United States v. U.S. Coin & Currency*, 401 U.S. 715, 28 L.Ed.2d 434 (1971) cited in Honda's petition, Coons hereby incorporates by reference the argument made by respondent Attorney General of New Jersey in its Brief in Opposition to Petition for a Writ of Certiorari at pages 15-28.

II makes ample and appropriate reference to state precedent, at the heart of its ruling to apply the judgment in *Coons I* prospectively is a reasoned application of federal equitable principles in the context of a constitutional challenge to a state statute in a civil case. Even with the capable aid of its supporting corporate *amici*, Honda Petition at 1, the defendant unregistered foreign corporation has failed to demonstrate the existence of a "real and embarrassing conflict of opinion and authority" in *Coons II* of the nature that mandates the grant of a writ of certiorari. *Layne & Bowler Corp. v. Western Well Works, supra,* 261 U.S. at 393, 67 L.Ed. at 714.

CONCLUSION

For the above stated reasons, as well as those advanced by respondent Attorney General of New Jersey in its separate submission, Coons respectfully submits that Honda's petition for certiorari should be denied.

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No. 84-385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF *

1. *Coons II Creates a New and Independent Violation of the Commerce Clause.* Honda's petition demonstrated that because the prospectivity ordered in *Coons II* severely undermines the Commerce Clause interests recognized in *Coons I* and subjects constitutionally protected conduct to punishment, this Court's decisions in *Lemon* v. *Kurtzman*, 411 U.S. 192, 201-03 (1973) (*Lemon II*), *New York* v. *Cathedral Academy*, 434 U.S. 125, 129-34 (1977), and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, 723-24 (1971), mandate that "a rule of complete retroactivity"—rather than a balancing test of the sort set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971)—must control. Pet. at 12-18. Neither respondent Coons nor the Attorney General of New Jersey adequately answers Honda's argument. Respondent Coons' response is to cite the Attorney General's brief. Coons' Opp. at 16 n.12. The Attorney General, in turn, attempts to answer Honda's point by mischaracterizing it. He states that Honda's position is that "a *per se* rule of retroactivity should be applied where a state civil statute is held unconstitutional," and that this conclusion is "incorrect." A.G. Opp. at 15-16.

Honda's position is not—contrary to the Attorney General's characterization—that every time a state statute is held unconstitutional, the decision must be retroactive. Rather, the point is that a state or federal court may not, as the New Jersey Supreme Court did in *Coons II*, apply a constitutional decision only prospectively without any concern for the impact on constitutional rights. Instead, the effect on constitutional interests must be assessed, and when, as here, non-retroactivity would lead to a new and independent constitutional violation, a rule of complete retroactivity must govern.

Coons I held, relying on a long line of decisions of this Court, that the Commerce Clause did not permit New Jersey to deny its statutes of limitation to non-New Jer-

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* Honda's Rule 28.1 statement appears at p. ii of its Petition for Certiorari.

sey corporations solely because those corporations had not registered to do business in the state. App. 38a-40a. Under the prospectivity ruling in *Coons II*, this unconstitutional discrimination against non-New Jersey corporations will continue in every case currently pending in New Jersey, in every future personal injury case which is filed prior to August 3, 1985, and in every future contract case which is filed prior to August 3, 1989. Pet. at 4-5. As both respondents acknowledge, hundreds of cases in both New Jersey state and federal courts will be affected, Coons' Opp. at 14 n.9; A.G. Opp. at 10-11; and numerous non-New Jersey corporations will be penalized for years in the future simply for exercising their constitutional right not to register to do business in New Jersey.

This Court recognized in *Lemon II* and *Cathedral Academy* that a constitutional decision may not be applied non-retroactively if to do so would "substantially undermine the constitutional interests at stake," or present more than a "remote possibility of constitutional harm," or result in a "new and independently significant infringement" of constitutional guarantees. *Lemon II*, 411 U.S. at 201-03; *Cathedral Academy*, 434 U.S. at 134. Similarly, in *U.S. Coin*, this Court held that "a rule of complete retroactivity" must control if non-retroactivity would punish conduct "that cannot constitutionally be punished in the first instance." 401 U.S. at 723-24. In this case, not only does the prospectivity ordered in *Coons II* "substantially undermine" the Commerce Clause interest recognized in *Coons I* and present more than a "remote possibility" of constitutional harm, the decision in *Coons II* creates a significant violation of the Commerce Clause; it countenances an acknowledged unconstitutional discrimination which permits non-New Jersey corporations, as well as state and federal courts, to be burdened with stale claims for years in the future. So too, the prospectivity ordered in *Coons II* means that Honda and similar non-New Jersey corporations will be penalized for years for conduct which "cannot constitutionally be punished"—that is, for exercising their right

under the Commerce Clause not to register to do business in New Jersey. The principles set forth in *Lemon II*, *Cathedral Academy*, and *U.S. Coin* mandate that when non-retroactivity will so undermine constitutionally protected interests, retroactivity must be the rule.

This analysis cannot be answered—as respondent Coons attempts, Coons' Opp. at 8-9—by merely repeating the statement from *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932), that "the federal constitution has no voice upon the subject" of retroactivity. The issue in *Sunburst* was whether a state court violated the federal constitution by applying a state statutory decision only prospectively. 287 U.S. at 361. *Sunburst* does not mean that constitutional decisions may be applied only prospectively without regard for constitutional interests. As this Court recognized in *Lemon II*, "*Sunburst* does not, of course, suggest that we may ignore constitutional interests in deciding whether to attach retrospective effect to a constitutional decision of this Court." 411 U.S. at 200 n.2.

It is also no answer to suggest that the recent amendment to the tolling statute has "cured" the constitutional problem. A.G. Opp. at 13.[1] Even assuming that the amended statute is constitutional,[2] it has, in fact, enhanced, rather than diminished, the constitutional problem created by *Coons II*. The amended statute has had no effect on pending cases; in all such cases, *Coons II* prevents non-New Jersey corporations from asserting a statute of limitations defense. What the amendment has done, however, is to extend further the time during which non-New Jersey corporations are not able to assert state statutes of limitation. Under *Coons II*, a non-New Jersey corporation could assert a statute of limitations defense in

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[1] The amendment to New Jersey's tolling statute is reprinted at page 1a of respondent Coons' Cross-Petition and Appendix for a Writ of Certiorari (No. 84-591).

[2] As explained at p. 13 n.6 of Honda's Opposition to respondent Coons' Cross-Petition, the new tolling statute may itself violate the Commerce Clause.

a personal injury action filed after *August 3, 1985*, and in a contract action filed after *August 3, 1989*; under the amended statute, even a foreign corporation which designated an agent in New Jersey the day the amendment was adopted will not be able to assert a limitations defense in personal injury cases filed prior to *August 23, 1986*, or in contract cases filed prior to August *23, 1990*. Rather than eliminating the constitutional violation created by *Coons II*, then, the amendment to the tolling statute has continued for at least one additional year the unconstitutional discrimination against non-New Jersey corporations created by *Coons II*. Thus, the ultimate effect of the statutory amendment is to magnify, rather than "cure," the unconstitutionality of *Coons II*.[3]

2. *The New Jersey Supreme Court Relied on State Law in Coons II.* In the third paragraph of *Coons II*, the court stated: "We now hold *as a matter of state law* that *Coons I* is to be applied prospectively only . . . ." App. 4a (emphasis added). This application of state law by a state court to determine the retroactivity of a federal constitutional decision has broad constitutional significance which merits this Court's attention. Indeed, both respondent Coons and the Attorney General appear to concede that because *Coons I* involves a federal constitutional right, its retroactivity must be governed by federal law, Pet. at 10-11; neither argues that issue. Instead, both attempt to get around the clear reliance in *Coons II* on state law by arguing that *Coons II* borrowed enough principles from the federal retroactivity cases that the decision, in effect,

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[3] Both respondent Coons and the Attorney General acknowledge that the amendment has extended by at least one year the period in which New Jersey residents may sue foreign corporations on stale claims without a statute of limitations bar. Respondent Coons explains that the amendment continues "without interruption" the "procedural remedy" of tolling against non-New Jersey corporations. Coons' Opp. at 4 n.3. The Attorney General states that the amendment and *Coons II* work together to "retain the tolling effect for most causes of action involving foreign, unrepresented corporate defendants without any gap." A.G. Opp. at 14 n.*.

applied federal law. Thus, respondent Coons argues that the *Coons II* court applied retroactivity principles "drawn from" both federal and state decisions, Coons' Opp. at 6-7, and that, while *Coons II* made "ample and appropriate reference to state precedent," the "heart" of the ruling is federal law. Coons' Opp. at 17.

In deciding whether to apply a federal constitutional decision non-retroactively, however, a state court must do more than "draw from" federal decisions; it must *apply* federal law, as both state and federal cases uniformly hold. Pet. at 10-11. In *Coons II*, in contrast, the New Jersey court not only stated that it reached its decision "as a matter of state law," it picked and chose among state and federal law principles, applying some and rejecting others. In the end, the decision in *Coons II* was the result of a hodgepodge "balancing" test, which was formulated by the New Jersey court, which took no account of constitutional concerns, and which is inconsistent with federal retroactivity principles.

The decision in *Coons II* could hardly have been more explicit in its reliance on state law. New Jersey cases are cited predominantly; the court speaks of the approaches to retroactivity "that have emerged from *our* case law." App. 7a (emphasis added). Although federal cases are cited, they are discussed only in conjunction with New Jersey decisions. For example, the New Jersey court states that its prospectivity ruling is based on "principles drawn from *our own state decisions* as well as from United States Supreme Court cases," and that "[t]he development of New Jersey's retroactivity law has proceeded on a track *roughly* paralleling that represented by the [federal law] cases discussed above." App. 7a, 11a (emphasis added).

The result in *Coons II* can also not be reconciled with federal retroactivity principles. While the *Coons II* court cited and discussed parts of *Lemon II*, the *Coons II* court wholly ignored the principles set forth in *Lemon II*, as

well as *Cathedral Academy* and *U.S. Coin.* As explained above, these decisions mandate that constitutional decisions may not be applied only prospectively if prospectivity would "substantially undermine" constitutional interests, present more than a "remote possibility" of constitutional harm, or subject constitutionally protected conduct to punishment. The result of *Coons II*, therefore, as well as the language, shows that state retroactivity principles controlled.

Moreover, even if the equitable balancing test set forth in *Chevron Oil* were the proper standard for deciding the retroactivity of *Coons I*, the court in *Coons II* did not correctly apply *Chevron.* As noted in Honda's petition (at 19), the *Coons II* court openly admitted that *Coons I* did not satisfy *Chevron*'s "threshold" "clear break" test for prospectivity.[4] *Coons II* also misapplied other *Chevron* principles. *Coons II* paid scant attention to the impact of prospectivity on the purpose of the *Coons I* rule, *i.e*, the termination of unconstitutional discrimination against and burdens on non-New Jersey corporations. *Coons II* also merely "presumed" that there had been actual reliance on the tolling statute, App. 17a, even though evidence of actual reliance has generally been deemed "fundamental" by the federal courts to prospectivity. Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. Rev. 745, 773 (1983). Indeed, neither respond-

[4] Respondent Coons contends that any argument that *Chevron* includes a "threshold" "clear break" test is "totally misplaced." Coons' Opp. at 7. He thus ignores the explicit statement by this Court in *United States* v. *Johnson*, 457 U.S. 537, 550 n.12 (1982), that the initial *Chevron* test seeks to determine whether a decision was a "clear break" with past law, and that this "clear break" test is a "threshold" requirement for holding a civil decision nonretroactive. And, in reprinting the quote from *Johnson* that "all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron*," Coons' Opp. at 7, respondent Coons leaves out the cross-reference in that the quote to the earlier portion of *Johnson* which explained *Chevron*'s "threshold" "clear break" requirement. See Pet. at 19 & n.13.

ent Coons nor the Attorney General have to date produced *any* evidence of actual reliance by New Jersey plaintiffs on the tolling statute. In his brief to this Court, the Attorney General echoes the presumption of reliance made by the *Coons II* court, stating that "there *may* exist *potential* plaintiffs" who postponed suit in reliance on the tolling statute. A.G. Opp. at 10 (emphasis added). Respondent Coons also makes no attempt to show actual reliance on the statute; he obviously would be hard-pressed to do so, since the fact that he sued both Honda and American Honda—a registered New Jersey corporation—at the same time shows that he placed no reliance whatever on the tolling statute.[5]

The conclusion is inescapable that rather than applying the balancing test outlined in *Chevron*, the *Coons II* court drew on a hodgepodge of "equitable" principles and used that mix of principles to create a state-law balancing test far removed from the test outlined in *Chevron*. Under the balancing test applied by the New Jersey court in *Coons II*, a decision may be applied prospectively even if it does not constitute a clear break with past law, even if prospectivity severely undermines the purposes of the decision, and even if there was no justifiable or actual reliance on a prior rule. This peculiar "balancing" test is not a proper application of *Chevron*.

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[5] Instead of responding to Honda's point concerning the absence of actual reliance, respondent Coons argues that, if retroactive, *Coons I* would "effectively shorten[] the applicable statute of limitations," and unconstitutionally deprive him of a "fair and reasonable opportunity" to adjust to a new limitations period. Coons' Opp. at 13 & n.8. But for personal injury actions such as respondent Coons', the limitations period has always been two years, N.J. Stat. Ann. § 2A:14-2 (West 1952); and the New Jersey courts have already determined that respondent Coons did not sue on his claim in a timely fashion. App. 65a-68a. If *Coons I* were retroactive, respondent Coons and similarly-situated plaintiffs would thus be deprived only of the chance to litigate claims against non-New Jersey corporations which they cannot bring against New Jersey corporations because of the statute of limitations bar.

If this Court allows *Coons II* to stand, it will be sending a message to state courts that they are free to create and apply their own mix of "equitable" factors to decide whether a federal constitutional decision will be retroactive. The retroactivity of federal constitutional decisions, however, should not be left to the unfettered discretion of state courts, with differing decisions based on a particular court's determination of the mixture of governing rules. Not only would such a result be in conflict with an unbroken line of precedents of this Court and of other state courts of last resort, Pet. at 10-11, it would be inconsistent with a judicial system where the federal courts are the ultimate protectors of federal constitutional rights. By granting certiorari, this Court can fulfill its responsibility for ensuring the proper implementation of federal constitutional guarantees.[6]

3. *The Amendment of the Tolling Statute Does Not Make this Case of "Isolated Significance."* Quoting from *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 76-77 (1954), respondent Coons implies that the amendment of the tolling statute last August makes this case of "isolated significance," lacking in public importance, and hence unworthy of this Court's review. Coons' Opp. at 15-17. This is untrue. There are hundreds of cases pending in New Jersey state and federal courts potentially affected by *Coons II*;

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[6] The Attorney General suggests that this Court's decision in *Bacchus Imports, Ltd.* v. *Dias*, 52 U.S.L.W. 4979, 4983 (U.S., June 29, 1984), shows that this Court has granted state courts a "large measure of discretion" and "wide latitude" in formulating an "appropriate remedy" when a state statute has been overturned on federal constitutional grounds. A.G. Opp. at 19. The Attorney General misreads *Bacchus*. While this Court remanded *Bacchus* to the state court after holding a state statute unconstitutional, it did not leave the remedy for that constitutional violation wholly in the unfettered discretion of the state court. Instead, the purpose of the remand was to allow the state court to resolve certain "intertwined" state law issues, and to develop "more of a record." This Court did not state that it was abdicating responsibility for the remedy issue entirely, only that it was reluctant to address that issue "in the first instance." *Id.*

as pointed out in Honda's petition, *amicus* Brinco Mining Limited alone indicated to the New Jersey court that a significant number of the six hundred cases pending against it in New Jersey may be barred but for *Coons II*, and in federal court alone, 60 motions for summary judgment on the statute of limitations are pending. Pet. at 17 & n.12. If *Coons II* is allowed to stand, these and other cases will proceed to judgment solely against non-New Jersey corporations, while New Jersey corporations will be dismissed on statute of limitations grounds. The amended statute will have no effect on these pending cases.[7] Moreover, as explained in Point 1 above, the amended statute extends for at least one additional year the continuing constitutional violation created by *Coons II*; it thus magnifies, rather than diminishes, the constitutional problem, since many more otherwise barred claims may be filed in New Jersey state and federal courts during the extra time afforded by the amended statute. In addition to the impact on pending and future New Jersey cases, the question presented by *Coons II*—whether a state court may formulate its own state-law "balancing" test to determine the retroactivity of federal constitutional decisions—is of general constitutional significance, and merits this Court's consideration.

4. *Respondent Coons Is Not the "Champion of the Cause."* Respondent Coons answers the final point presented in Honda's petition—that, under federal law, Honda and the corporate *amici* who obtained the constitutional decision in *Coons I* are entitled to the benefits of that ruling, Pet. at 25-26—by arguing that he,

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[7] It should also be stressed that most of the hundreds of cases affected by *Coons II* do not involve situations where the plaintiff missed the limitations period by only a few days. Respondent Coons missed the statute of limitations by two years. App. 65a-68a. Many of the cases pending against *amicus* Brinco Mining Limited involve plaintiffs who missed the statute by even longer periods. Further complicating the stale claims problem faced by Brinco is that the suits against it usually involve incidents from the 1950s; the longer the limitations period is tolled, the greater this problem of stale claims becomes.

rather than Honda, is the "champion" of the prospectivity ruling in *Coons II*, and therefore entitled to the benefits of that decision. Thus, Mr. Coons contends, "the decision of the majority in *Coons II* is totally consistent with the general rule that those who champion the cause should benefit by their efforts." Coons' Opp. at 14. This argument has no support in federal retroactivity principles. When, as here, a decision has been held prospective, there is necessarily one litigant who has obtained the ruling on the merits and another who is responsible for the holding of prospectivity. If, as respondent Coons asserts, the party responsible for the prospectivity ruling should be rewarded, in any case where a decision is held prospective the litigant who obtained the decision on the merits would not benefit by the ruling it obtained. Litigants would thus have no incentive to challenge outmoded doctrines or unconstitutional statutes. In fact, however, the federal rule has always been the opposite; the party responsible for correcting the underlying law has received the fruits of its effort. Pet. at 25. Here, too, Honda and its *amici* should receive the benefits of the constitutional ruling they obtained in *Coons I*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 20, 1984

Supreme Court, U.S.
FILED
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No. 84-385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONDA MOTOR CO., LTD.,
Petitioner,

v.

WALTER P. COONS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITIONER'S SUPPLEMENTAL BRIEF *

Pursuant to Rule 22.6 of this Court, petitioner submits this Supplemental Brief to call to this Court's attention the recent federal district court decision in *Cohn* v. *G. D. Searle & Co.*, No. 74-450 (D.N.J. December 7, 1984) (Debevoise J.). Both *Searle* and the case presented by this petition were remanded to the lower courts by this Court in 1982. *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982); *Honda Motor Co., Ltd.* v. *Coons*, 455 U.S. 996 (1982). The district court's opinion grants Searle summary judgment on statute of limitations grounds, ruling that the New Jersey tolling statute violates the Commerce Clause and that the Commerce Clause ruling must be applied retroactively. The decision thus reaches

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*** Honda's Rule 28.1 statement appears at p. ii of its Petition for Certiorari.**

a result on the retroactivity question in direct conflict with the New Jersey Supreme Court's opinion in *Coons II*, review of which is sought here.[1]

THE IMPORTANCE OF *SEARLE* TO THE PRESENT PETITION

The district court's decision in *Searle* is important to the present petition in two respects. First, the decision recognizes that *Coons II* is wrong on the merits for reasons identical to those set out in the petition. Second, the decision shows that *Coons II* is in conflict not only with other state courts of last resort (Pet. at 10-12), but also with at least one federal district court in New Jersey. Thus, review by this Court is necessary.

1. *The Searle decision on the merits.* In *Searle*, the district court ruled first that the New Jersey Supreme Court correctly decided in *Coons I* that the New Jersey tolling statute violates the Commerce Clause. SA-7 - SA-8. The court refused, however, to follow the New Jersey Supreme Court's decision on retroactivity in *Coons II*. The court held that it was not bound by *Coons II*, since federal law must control the retroactivity of a federal constitutional decision, and since *Coons II* "did not even purport to apply federal law when deciding the retroactivity question." SA-7. See Pet. at 10-12; Petitioner's Reply Br. at 4-8. The court then concluded that, under federal law, retroactivity of its constitutional holding was mandated. SA-8.

In analyzing the retroactivity issue, the court noted, echoing the reasoning of the petition filed in this Court, that if its Commerce Clause ruling were only prospective, "this burden on commerce [would] perpetuate itself into

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[1] The district court's opinion in *Searle* is reprinted in the appendix to this Supplemental Brief. Pages in that appendix will be designated "SA" to differentiate them from pages in the separately bound appendix filed with Honda's petition.

the future" and thus "defeat[] the constitutional ruling striking down an impermissible burden on commerce." SA-8. Citing this Court's opinions in *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977), *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*), and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715 (1971), the court reasoned that a balancing test to determine retroactivity may not be appropriate in this type of case "where there is an immediate burden on commerce of an extensive and persuasive nature." SA-8 - SA-9. Pet. at 12-18; Petitioner's Reply Br. at 1-4.

The Court then ruled, again echoing the reasoning of the petition, that even if the balancing test set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) and *United States* v. *Johnson*, 457 U.S. 537 (1982), were applicable, its decision that the tolling statute was unconstitutional should still be retroactive. SA-8 - SA-15. The court held that the first *Chevron* criterion was not satisfied in this case, because the statutory ruling in *Coons I* that the tolling statute required registration "was not a clear break with past law," but instead "decided questions as to which there had been confusion and controversy." SA-10. Pet. at 19-23; Petitioner's Reply Br. at 6-7. The second *Chevron* criterion—whether retrospective operation will further or retard the purpose of the rule in question—was also not met, the court decided, since prospectivity would "defeat[]" the purpose of the Commerce Clause holding. SA-10. Pet. at 23; Petitioner's Reply Br. at 6. As to the third criterion, which is general equitable considerations, the court ruled that these considerations also supported retroactivity. Although the case presented a "tragic situation," it was one that the plaintiffs "could readily have avoided" by commencing their action within the statutory limitations period, and "the marginal equities in this case do not compel the conclusion that implementation of important constitutional principles should be deferred." SA-10 - SA-15. Pet. at 24. Thus, the court concluded, retro-

activity of the Commerce Clause ruling was dictated even under a balancing test.

Finally, the court noted that, as pointed out by the *Coons II* dissenters and the petition, even an otherwise wholly prospective decision should benefit those responsible for changing the law, and that Searle "was among those" who secured the overruling of the tolling statute. SA-14. Pet. at 25-26; Petitioner's Reply Br. at 9-10. For this reason, as well as all the others, the court ruled that Searle's motion for summary judgment on the statute of limitations should be granted. SA-15.

2. *The Additional Conflict Searle Creates.* The decision in *Searle* means that *Coons II* is in conflict not only with other state courts of last resort (Pet. at 10-12), but also with at least one federal district court in New Jersey. In addition, the two New Jersey federal district courts to consider the retroactivity issue—*Searle* and *Hopkins* v. *Kelsey-Hayes, Inc.*, No. 78-1646 (D.N.J. June 21, 1984) (Pet. at 7 n.5)—have reached opposite conclusions. These conflicts illustrate that the lower courts are in disagreement over whether state or federal law should govern the retroactivity of a constitutional ruling, and over the correct result in the circumstances of this case under the applicable retroactivity law. These questions are thus appropriate for this Court's review. As the petition points out, there are hundreds of cases pending in New Jersey state and federal courts which would be affected by a decision by this Court in this case, and the litigants in those cases need a clear ruling. Pet. at 17; Petitioner's Reply Br. at 8-9.[2] In these circum-

[2] Without a ruling by this court in *Coons II*, the conflicts in the lower courts may create peculiar results, as illustrated by the situation facing Brinco Mining Limited, an *amicus* before the New Jersey Supreme Court in *Coons I* and *Coons II*. The petition notes (at 17 & n.12) that there are approximately six hundred products liability claims pending against Brinco in New Jersey; one hundred of these claims are pending in diversity jurisdiction in fed-

stances, there is a compelling need for the Court to grant the present petition.

CONCLUSION

In sum, the recent district court opinion in *Searle* provides additional support for the petition in two ways. *Searle* shows that, for the reasons stated in the petition, *Coons II* is wrong on the merits. The decision also demonstrates that *Coons II* is in conflict not only with other state courts of last resort, but also with at least one federal district court in New Jersey. For these additional reasons, as well as for those already stated in the petition and in petitioner's reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 1984

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eral court, and the other five hundred are pending in New Jersey state court. If *Coons II* is not reviewed by this Court, Brinco will not have a statute of limitations defense in any of the pending state court actions, or in new cases filed in state court for the next two to six years. Brinco may, however, be able to assert a limitations defense in some or all of the pending and future cases filed against it in federal court in New Jersey. Apart from the difference in forum, the cases pending against Brinco in state and federal court in New Jersey are essentially identical.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 74-450

SUSAN COHN and WALTER COHN, her husband,
Plaintiffs,

v.

G. D. SEARLE & Co.,
Defendant.

OPINION

[Filed Dec. 7, 1984]

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DEBEVOISE, District Judge.

Procedural History

Plaintiffs, Susan and Walter Cohn, who are husband and wife, instituted this action in the New Jersey Superior Court against defendant G. D. Searle & Co. The complaint alleges that Susan Cohn suffered a stroke and that the stroke was caused by her use of an oral contraceptive manufactured by Searle.

Susan Cohn's stroke occurred in 1963. In late 1969 or 1970 plaintiffs became aware that there may have been a causal link between use of the contraceptive and the stroke. Suit was instituted in 1974, more than ten years after the stroke and approximately four years after plaintiffs became aware of the possibility of a causal relationship between the stroke and Searle's contraceptive.

After removing the case to this court Searle moved for summary judgment based upon New Jersey's 2-year statute of limitations. N.J.S.A. 2A:14-2. Plaintiffs resisted the motion, relying on N.J.S.A. 2A:14-22 which tolls the statute of limitations for a cause of action against a foreign corporation that "is not represented" in New Jersey "by any person or officer upon whom summons or other original process may be served." Judge Meanor, to

whom the case was then assigned, granted Searle's motion, ruling that the tolling provision was invalid under the Equal Protection Clause and that, therefore, the 2-year statute of limitations barred plaintiffs' action. *Cohn v. G. D. Searle & Co.*, 447 F. Supp. 903 (D.N.J. 1978).

Plaintiffs appealed. The Court of Appeals reversed, holding that there was a rational basis for the tolling provisions and that consequently the New Jersey statute does not violate the Equal Protection Clause. *Hopkins v. Kelsey-Hayes, Inc.*, 628 F.2d 801 (3d Cir. 1980).

The United States Supreme Court granted certiorari. It too concluded that the New Jersey statute does not violate the Equal Protection Clause. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). In a footnote it addressed Searle's due process contentions. As to the argument that the tolling statute violates due process by unfairly and irrationally denying certain foreign corporations the benefit of the statute of limitations without furthering any legitimate societal interest, the Court stated that "this due process argument is nothing more than a restatement of [Searle's] equal protection claim." 455 U.S. at 412, n.7. Because it was not raised in the Court of Appeals the Court declined to address Searle's other due process argument, namely, that it was deprived of due process because it could obtain the benefit of New Jersey's statute of limitations only by appointing an agent to accept service, and that such appointment would subject it to suit in New Jersey when there otherwise would not be the minimum contacts required for suit. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The Supreme Court discussed but did not decide the question whether the tolling provision violates the Commerce Clause. It did not resolve this issue for two reasons. First, neither the district court nor the Court of Appeals addressed the question directly, although in a footnote the district court suggested that the tolling pro-

vision would violate the Commerce Clause. 447 F. Supp. at 911, n.17. Second, it was unclear under New Jersey law whether the tolling statute required a corporation to register to do business in New Jersey pursuant to N.J.S.A. 14A-13-2 in order to obtain the benefit of the statute of limitations or whether the mere appointment of an agent would suffice.

In view of the unsettled state of New Jersey's law, the Court remanded the case to the Court of Appeals so that it might "determine whether [Searle's] Commerce Clause argument, if it was properly raised below, has merit." 455 U.S. at 414. The Court of Appeals remanded the case to this court for a decision on the validity of the tolling statute under the Commerce Clause. *Hopkins v. Kelsey-Hayes, Inc.*, 677 F.2d 301 (3d Cir. 1982).

In 1982, after remand, Searle moved for summary judgment on the ground that the tolling statute is unconstitutional under the Commerce Clause and also on the due process ground which it raised but which was not decided by the Supreme Court. The Attorney General of New Jersey moved to intervene and cross-moved for summary judgment. Judge Meanor granted the intervention motion. Plaintiffs joined in the Attorney General's cross-motion. Judge Meanor stayed proceedings until final disposition of a New Jersey case which required that the State Supreme Court decide what action a foreign corporation must take in order to escape the tolling effect of N.J.S.A. 2A:14-22.

The New Jersey Supreme Court has now eliminated any ambiguity which may have existed in the tolling statute. In *Coons v. American Honda Motor Co.*, 94 N.J. 307 (1983) it held (i) that foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business; (ii) the tolling statute is a forced licensure provision and as such is in violation of the Commerce Clause; and (iii) the decision

would be given retrospective effect, making it applicable to all matters that had not reached final judgment at the time of that decision.

Thereafter the plaintiff in *Coons*, supported by numerous *amici curiae* (including the plaintiffs in the instant case), filed a petition for rehearing on all issues. The Court granted the petition, limited to the retroactivity issue. After rehearing and further consideration it changed its position on retroactivity and a majority of the Court ruled: "We now hold as a matter of state law that *Coons I* is to be applied prospectively only, from the date of that decision, August 3, 1983." As further explicated by the Court, ". . . the statute of limitations as to foreign, unrepresented corporations commences to run as of [August 3, 1983]." *Coons v. American Honda Motor Co., Inc.*, 96 N.J. 419, 422, 435 (1984).

Although the New Jersey Supreme Court decided only the state law retroactivity question, it discussed both state and federal cases and proceeded as if state law and federal law on the subject were "inspired by the same considerations." 96 N.J. at 426.

There is now pending in the United States Supreme Court a petition for a writ of certiorari to review the decision in *Coons II*. That Court will, of course, finally decide the issues now before us, but in view of the importance of this case to both parties and in view of the long delay to which the case has already been subjected, I believe I should rule on the same issues raised by the pending motions in light of *Coons I* and *II*.

Conclusions of Law

There can be no question that the New Jersey Supreme Court has decided definitively the meaning of N.J.S.A. 2A:14-22, which tolls the running of the statute of limitations against foreign corporations which are not "represented" in New Jersey. It held in *Coons I* "that a for-

eign corporation must obtain a certificate to do busines in this state, under N.J.S.A. 2A:13-4, in order to achieve 'representation' in the context of N.J.S.A. 2A:14-22." 94 N.J. at 309.

Two questions of pertinence to the present case remained after the New Jersey Supreme Court decided the statutory question: (i) Does N.J.S.A. 2A:14-22, as so interpreted, unconstitutionally burden interstate commerce? and (ii) If it is concluded that N.J.S.A. 2A:14-22 does unconstitutionally burden interstate commerce, should such a conclusion be applied retroactively or prospectively? In *Coons I* the New Jersey Supreme Court held that as a matter of federal law the statute does unconstitutionally burden interstate commerce by requiring a foreign corporation engaged exclusively in interstate commerce to obtain a certificate to do business in order to gain the advantage of the statute of limitations. In *Coons II* the New Jersey Supreme Court held that as a matter of state law, its holding of unconstitutionality should be applied prospectively.

A. *Applicable Law*: Both parties agree that federal law governs the question of the constitutionality of N.J.S.A. 2A:14-22. Since this is a federal question the issue must ultimately be decided by the United States Supreme Court. Although the decision of the New Jersey Supreme Court applying federal law to the question is both persuasive and instructive it is not binding, and under the mandate of the United States Supreme Court and the Court of Appeals I am required to make an independent determination of the constitutionality of the tolling statute under the Commerce Clause.

Plaintiffs urge strenuously that I am bound by the decision in *Coons II* that, assuming the unconstitutionality of the tolling statute, the constitutional determination is to be applied prospectively and not retroactively. However the cases cited by plaintiffs involve interpretation of state statutes and the effect to be given to changes in

state law, not, as in the present case, the question of the retroactivity of federal constitutional decisions.

It would be difficult to reconcile rationally a holding that federal law will be applied to determine the constitutionality of a statute but that the states remain free to determine under state law when and how the ruling of unconstitutionality will be applied. Such a rule would provide a tool for nullification of constitutional decisions and does not constitute current law. For example, the United States Supreme Court reviews state court decisions on the retroactivity of new federal constitutional protections for criminal defendants, thus holding by clear implication that federal law controls. *Brown v. Louisiana*, 447 U.S. 323 (1980). Federal law governs the retroactivity question in this case.

The New Jersey Supreme Court did not even purport to apply federal law when deciding the retroactivity question. Therefore, while *Coons II* may be instructive by way of analogy, it does not address the federal question implicated in the present motions.[1]

B. *Burden on Interstate Commerce*: I conclude that the New Jersey Supreme Court correctly decided that interstate commerce is unconstitutionally burdened by the requirement that in order to avoid the effect of N.J.S.A. 2A:14-22 a foreign corporation must qualify to do business in New Jersey. The United States Supreme Court has held repeatedly that a state cannot discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state. *E.g., Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974). This is just what New Jersey's tolling statute does. *Coons I* discusses in some detail ap-

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[1] I appreciate that another judge in this district concluded that *Coons II* governs the retroactivity question. *Hopkins v. Kelsey-Hayes*, Civil Action No. 78-1646. For the reasons set forth above I do not agree.

plication of the pertinent constitutional principles to N.J.S.A. 2A:14-22, 94 N.J. at 316-318, arriving at a conclusion with which I agree.[2]

C. *Retroactivity of Ruling of Unconstitutionality*: As stated above, the question whether a ruling that New Jersey's tolling statute is unconstitutional should be applied retroactively is a federal, not a state law question. The New Jersey Supreme Court did not address the federal question. In my opinion, applying federal law, the determination that the statute is unconstitutional must be given retroactive effect and should be applied, at the very least, to the instant case. The New Jersey Supreme Court concluded, as have I, that N.J.S.A. 2A:14-22 imposes an impermissible burden on interstate commerce. That being the case, the burden should be lifted. A rule giving prospective effect to the decision of unconstitutionality permits this burden on commerce to perpetuate itself into the future. Thus if *Coons II* is accepted, foreign corporations engaged solely in interstate commerce will not be able to raise a limitations defense in future actions filed in New Jersey for two or six years from August 3, 1983 (depending on whether the action sounds in tort or asserts a property claim). This defeats the constitutional ruling striking down an impermissible burden on commerce. *Cf., New York v. Cathedral Academy*, 434 U.S. 125 (1977); *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971).

Plaintiffs urge that application of the balancing test articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97

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[2] Having decided that N.J.S.A. 2A:14-22 is unconstitutional on Commerce Clause grounds, it is unnecessary to address the Due Process grounds which Searle advances here and which were not dealt with in footnote 7 of the Supreme Court's opinion. *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 , 412 (1982). Further, I am not at all sure that the Court of Appeals mandate authorizes me to go beyond the Commerce Clause issue.

(1971) would require prospective application of the constitutional ruling. I do not agree. I am not at all sure that a balancing test is called for in a situation such as this where there is an immediate burden on commerce of an extensive and pervasive nature. However, even if the balancing test is applicable, it would not call for prospective application of the ruling of unconstitutionality in this case.

In *Chevron* the Court noted that it had recognized the doctrine of non-retroactivity outside the criminal area in both constitutional and non-constitutional cases. It stated:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe v. United Shoe Machinery Corp.*, *supra*, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, *Allen v. State Board of Elections*, *supra*, at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, *supra*, at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma*, *supra*, at 706.

None of these factors are present in the instant case.

In *United States v. Johnson*, 457 U.S. 537 (1982) (a criminal case) the Court explained that the initial *Chev-*

ron test (applicable to civil cases) required a determination that the decision be a "clear break" with past law. Such a determination may be made only if a decision "[1] explicitly overrules a past precedent of [the court]; or [2] disapproves a practice [the court] arguably has sanctioned in prior cases; or [3] overturns a longstanding and widespread practice to which [the court] has not spoken, but which a near-unanimous body of lower court authority has expressed approval." 457 U.S. at 551.

The decision in *Coons I* does not meet *Chevron's* first criterion either as stated in *Chevron* or as explicated in *Johnson*. It was well established as a matter of federal law that a state may not discriminate against a foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state. There has always been the likelihood that N.J.S.A. 2A: 14-22 had just that effect. At the most there was confusion on the subject, see the New Jersey Supreme Court's discussion of this confusion in *Coons II*, 96 N.J. at 432-433. While, according to the New Jersey Supreme Court, *Coons I* was new law, it "did not literally alter precedent because there was none on the *holding* of the case." 96 N.J. at 433. Thus *Coons I* insofar as it interpreted N.J.S.A. 2A:14-22 was not a clear break with past law. It decided questions as to which there had been confusion and controversy.

The second *Chevron* criterion requires that the court look at the history and purpose of the rule and determine whether retrospective operation will further or retard its operation. The purpose of the constitutional rule which governs this case is to free interstate commerce from the burdens which might be imposed by the individual states through which that commerce flows. Retroactive application of *Coons I* furthers that objective; prospective application defeats it.

As to the third criterion, general equitable consideration must be weighed. In the present case plaintiff

Susan Cohn suffered a stroke in 1963. Walter R. Cohn, her husband, is both a co-plaintiff and the attorney for himself and his wife. By 1970, as found by Judge Meanor, he knew that his wife had had a cerebral vascular accident which may have been caused by Searle's contraceptive. That knowledge would, under usual circumstances, have started the statute of limitations running. By April 1970 he had compiled a medical-legal file. He asserts that he ascertained that Searle did not have an agent in New Jersey for purposes of service of process and that he relied on that fact and the tolling statute when he decided to defer filing suit until 1974. His reasons for waiting, he claims, were his desire to obtain more concrete medical information as to the causal connection and his wife's emotional and psychological condition at the time.[3]

This is a tragic situation, but one which plaintiffs could readily have avoided by commencing an action within two years of 1970 when they discovered the causal relationship. In 1970 the scope and effect of the tolling statute was not at all clear. At that time there was case law which suggested that circumstances other than qualifying to do business in New Jersey would avoid the effect of the tolling statute. For example, one court suggested that the tolling statute would not govern an action in which the foreign corporation was subject to service of process under R.S. 39:7-2, which provided for service on foreign corporations and others by serving the Director of Motor Vehicles in suits arising out of automobile accidents occurring in New Jersey. Further, it was urged that the tolling statute should not apply to any foreign corporation that was amenable to the personal jurisdic-

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[3] These facts are set forth in an affidavit of Walter R. Cohn sworn to on November 16, 1983 and apparently submitted to the New Jersey Supreme Court. A copy of the affidavit was attached to plaintiffs' brief in opposition to Searle's motion for summary judgment.

tion of the New Jersey courts through application of the long-arm rule or otherwise.

Although *Whalen v. Young*, 28 N.J. Super. 543 (Law Div. 1953) held that R.S. 39:7-2 permitting service on the Director of Motor Vehicles did not serve to avoid the effect of the tolling statute, exactly the opposite result was reached in 1962, when a trial court held that in such a situation a foreign corporation was represented in New Jersey and an action against it was not affected by the tolling statute. *Ferraro v. Ferro Trucking Co.*, 72 N.J. Super. 519 (Law Div. 1962). The language of the court in *Ferraro* emphasizing that the foreign corporation was amenable to service of process at all times and that statutes of limitation serve important policy goals should have alerted the careful attorney that there were risks entailed in relying on N.J.S.A. 2A:14-22 in any situation where a foreign corporation was subject to service under New Jersey's court rules or statutes.

In the present case Searle was amenable to service of process at all times under N.J. Ct. Rule 4:4-4(c)(1) either by service upon one of Searle's detail persons visiting New Jersey doctors and hospitals or by mailing process to its principal place of business under the long-arm provision of the Rule. See *Avdel Corp. v. Mecure*, 58 N.J. 264 (1971). Prior to 1980 respectable legal authorities urged that the statute tolling the limitations periods within which actions could be brought against foreign corporations unrepresented in New Jersey did not apply to foreign corporations which were amenable to long-arm service. That position was rejected in *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282 (1980), a case decided long after plaintiffs in the present case instituted their action. However, in 1970, when plaintiffs became aware of a possible cause of action against Searle, there was no assurance that views like those expressed by the dissenting Justices in *Velmohos* would not be adopted in New Jersey:

I would construe N.J.S.A. 2A:14-22 to toll the statute of limitations as to a foreign corporation against which there is a cause of action in this State only in a situation where such corporation is not amenable to personal jurisdiction.

Defendant corporations were subject to long-arm jurisdiction in this State at all relevant times as found by the trial court. See R. 4:4-4(c)(1). Indeed, service was made upon them pursuant to the rule. To hold that despite this, a plaintiff can sit back for any number of years and file suit at his pleasure against such foreign corporations, is to do violence to the concept of limitations of actions. The construction placed upon N.J.S.A. 2A:14-22 by the majority opinion, while following the literal language of the statute, frustrates the very purpose of the tolling provision and places this Court with a minority of jurisdictions. See Annotation, "*Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit of limitations remained subject to service during absence of nonresidence,*" 55 A.L.R. 3d 1158 (1974). As noted in the annotation, a majority of courts have refused to give application to tolling provisions when the party claiming the benefit of limitations has remained amenable to personal jurisdiction.

A recent comment in 10 Seton Hall L.Rev. 585 (1980) entitled "*The Tolling Provision of the Statute of Limitations—a Haven for the Dilatory Plaintiff,*" makes a critical analysis of N.J.S.A. 2A:14-22 and the position now taken in the majority opinion and rejects it on constructional as well as constitutional grounds. The comment concludes by stating that "[a] statute that serves to placate the dilatory plaintiff while denying an important right to a nonresident defendant is an anomaly in a jurisdiction noted for progressive developments in the law cor-

> responding to the changes in the circumstances to which the law applies." *Id.* at 613. Despite the rigidity of some tolling and limitations statutory provisions, this Court has always construed them to effectuate the true statutory purpose. See, *e.g.*, *Galligan v. Westfield Centre Service, Inc.*, 82 N.J. 188 (1980); *White v. Violent Crimes Compensation Board*, 76 N.J. 368 (1978). It has not done so today.
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> Although I find it unnecessary to reach the issue, the statutory construction of N.J.S.A. 2A:14-22 adopted by the majority also raises substantial questions of due process and equal protection of the laws. I would reverse the Appellate Division and reinstate the judgment of the trial court dismissing the complaint.

83 N.J. at 197-199. New Jersey attorneys should, therefore, have been aware of the constitutional and interpretive risks of reliance on the tolling provisions of N.J.S.A. 2A:14-22.

The dissenting opinion of three Justices in *Coons II* would have held that under state law "[i]rrespective of the general retroactivity of the *Coons I* decision, there should be no question that those responsible for effecting the change in law should benefit by their efforts"; else there would be no incentive for private attorneys to challenge existing possibly unconstitutional laws. 96 N.J. at 436. Searle was among those who were considered to have effected a change in the law. One of these dissenting Justices, Justice Garibaldi, went further and urged that even under state law *Coons I* should be given complete retroactive effect. She applied the first *Chevron* test (without reference to the gloss which *Johnson* may have put upon it) and concluded that *Coons I* established a new rule of law. However, she concluded, for certain of the reasons I have set forth above, that the second and third *Chevron* tests were not met.

Thus, although it is truly to be regretted that plaintiffs in this case will not have their day in court, the marginal equities in this case do not compel the conclusion that implementation of important constitutional principles should be deferred.

Searle's motion for summary judgment will be granted. The cross-motions for summary judgment of New Jersey's Attorney General and of plaintiffs will be denied.[4] Searle's attorneys are requested to present an appropriate form of order.

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.D.J.

DATED: December 7, 1984

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[4] On September 18, 1984 New Jersey's Attorney General wrote to the court advising that "[i]n light of the decisions in *Coons I* and *II*, it no longer appears necessary for the Attorney General to participate in the present proceeding." Regardless of the Attorney General's non-participation, his and plaintiffs' cross-motions for summary judgment are still pending and should be disposed of.

SUPREME COURT OF THE UNITED STATES

(1) HONDA MOTOR COMPANY, LTD.
84–385 *v.*
WALTER P. COONS

WALTER P. COONS
(3)
84–591 *v.*
HONDA MOTOR COMPANY, LTD.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Nos. 84–385 AND 84–591. Decided January 7, 1985

The petitions for writs of certiorari are denied.

JUSTICE REHNQUIST, dissenting.

In his cross-petition for certiorari Walter P. Coons seeks review of the New Jersey Supreme Court's holding that the New Jersey tolling statute, N. J. Stat. Ann. 2A:14–22 (West 1952), violates the Commerce Clause of the United States Constitution because it tolls the statute of limitations for claims against corporations not represented in New Jersey. *Coons* v. *American Honda Motor Co.*, 94 N. J. 307, 463 A. 2d 921 (1983). We upheld the constitutionality of this statute against Equal Protection and Due Process challenges in *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404 (1982). We expressly reserved the Commerce Clause question in *Searle* because the applicable New Jersey law was unclear. *Id.*, at 413–414. We also remanded to New Jersey courts a previous petition for certiorari arising out of Coons' lawsuit, for reconsideration in light of *Searle*. *Honda Motor Co.* v. *Coons*, 455 U. S. 996 (1982). That remand resulted in the New Jersey Supreme Court holding here, which Coons claims misapplies the Commerce Clause. Coons' suit has clarified the New Jersey law on the subject, and in striking down the New Jersey statute I think that the Supreme Court of New Jersey has gone beyond any of our Commerce Clause decisions. I would grant certiorari to review its decision.

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Coons was burned badly when the fuel filler cap on his Honda motorcycle malfunctioned during a collision. New Jersey provides a 2-year statute of limitations for the type of injury suffered by Coons. N. J. Stat. Ann. 2A:14–2 (West 1952). Coons waited four years, however, and brought suit in state court against Honda Motor Co. (American Honda) and its parent Honda Motor Co. of Japan (Honda of Japan). American Honda had a certificate to do business in New Jersey, as required by N. J. Stat. Ann. 14A:13–4 (West 1969); Honda of Japan had no certificate. Because Honda of Japan had no certificate it was not "represented" in New Jersey under N. J. Stat. Ann. 2A:14–22 (West 1952), and that statute therefore tolled the 2-year limitations period for all unrepresented corporations.[1] Thus American Honda successfully asserted a statute of limitations defense to Coons' complaint, but Honda of Japan could not.

A divided New Jersey Supreme Court held that interstate commerce was unconstitutionally burdened by § 14–22's requirement that a foreign corporation must qualify to do business in New Jersey before it could avail itself of the statute of limitations provided in N. J. Stat. Ann. 2A:14–2 (West 1952). The court relied on, *inter alia*, our holdings in

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[1] New Jersey Stat. Ann. 2A:14–22 (West 1952), has now been amended. See 1984 N. J. Laws, ch. 131. At the time of this lawsuit the statute stated in part:

[I]f any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the time so limited, the time or times during which such person . . . is not residing within this state or such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by this section. . . ."

According to the New Jersey Supreme Court, a corporation cannot be "represented" in New Jersey for purposes of the above statute until it has received a certificate of authority to do business. See *Coons* v. *American Honda Motor Co.*, 94 N. J. 307, 312–316, 463 A. 2d 921, 924–925 (1983).

Allenberg Cotton Co. v. *Pittman*, 419 U. S. 20 (1974), and *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197 (1914) to describe the tolling statute as a "forced-licensure provision," which when placed on corporations engaged in interstate commerce amounted to a "per se" violation of the Commerce Clause. 94 N. J., at 316–319, 463 A. 2d, at 926–927. Although both *Allenberg Cotton* and *Sioux Remedy* involved States which closed their courts entirely to foreign corporations, the New Jersey Supreme Court held that the rationale of those cases extended to the mere tolling of a statute of limitations against corporations unrepresented in the State.

I am not so sure that *Allenberg Cotton* and *Sioux Remedy* can be taken so far. The States involved in those cases totally barred foreign corporations from the state courts. Thus out-of-state corporations which entered into contracts in-state had no forum in which to enforce those contracts, and out-of-state competition was effectively precluded. New Jersey, however, provides greater protection to the contractual and legal interests of foreign corporations. For example, N. J. Stat. Ann. 14A:13–11 (West 1969), states in part:

> "(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State."
>
> See also *Materials Research Corp.* v. *Metron, Inc.*, 64 N. J. 74, 312 A. 2d 147 (1973)

The contested New Jersey statute simply tolls the statute of limitations for most civil suits. As the Court noted in *Searle*, the tolling statute attempts to preserve a cause of action against absent defendants who may be difficult to find and difficult to serve. 455 U. S., at 410. Moreover, the enactment of the New Jersey long-arm statute has not fully

relieved the difficulty facing residents injured by absent defendants. See *ibid.*

The statute does not place an insuperable burden on a foreign corporation because the corporation may always plead laches as a defense to a plaintiff whose tardiness impairs the corporation's ability to defend itself. See *id.*, at 411. All the corporation need do to commence running of the limitations period is to become represented in New Jersey. As we stated in *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945), and reiterated in *Searle*, 455 U. S., at 408, statutes of limitations represent a public policy decision about the privilege to litigate. Their shelter has never been a fundamental or natural right, but is provided only by legislative grace, subject to a relatively large degree of legislative control.

In drafting the contested statute the New Jersey Legislature sought to balance reasonable protection of its citizens from foreign tortfeasors against the requirement for unimpeded interstate commerce. The impact on interstate commerce here is fairly negligible. The New Jersey Supreme Court provided little discussion of why interstate commerce would actually be impeded by tolling a statute of limitations, subject to a laches defense, against an absent defendant not represented in the State. The existence of the tolling provision certainly did not dissuade Honda of Japan from selling motorcycles in New Jersey.

As we stated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970):

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

See also *Sioux Remedy*, *supra*, at 201.

The tolling provision of N. J. Stat. Ann. 2A:14–22 (West 1952), does not so scarcely benefit local interests and so

clearly burden interstate commerce that we should decline the opportunity to review this constitutional issue of first impression. The Court should grant certiorari review for Nos. 84–385 and 84–591.[2]

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[2] Honda of Japan brought the main petition in this case, No. 84–385, complaining of the New Jersey Supreme Court's decision, on rehearing, to apply its Commerce Clause holding prospectively. See *Coons* v. *Honda Motor Co.*, 96 N. J. 419, 476 A. 2d 763 (1984). The cross-petition, No. 84–591, was filed under this Court's Rule 19.5, and this Court should grant both the main petition and cross-petitions in order to reach the latter. See this Court's Rules 19.5, 20.5. If we were to reverse the New Jersey Supreme Court's Commerce Clause holding, there would be no need to address the issue presented in the main petition.